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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed June 25, 2004]

No. 01-16064
D.C. Docket No. 00-03414-CV-BBM-1

COVAD COMMUNICATIONS COMPANY, DIECA COMMUNICATIONS, INC., d.b.a. Covad Communications Company,
Plaintiffs-Appellants,

versus

BELLSOUTH CORPORATION, BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(June 25, 2004)

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before BARKETT and MARCUS, *Circuit Judges*, and HIGHSMITH*, *District Judge*.

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* Honorable Shelby Highsmith, United States District Judge for the Southern District of Florida, sifting by designation.

BARKETT, *Circuit Judge*:

After our decision in this case was issued on August 2, 2002, *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), the Supreme Court vacated our judgment and remanded for further consideration in light of its recent decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* 124 S. Ct. 872 (2004). Having carefully reviewed this opinion, we find that *Trinko's* interpretation of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the leading case finding liability under § 2 of the Sherman Act for refusal to cooperate with a rival, now forecloses several (but not all) of Covad's claims. Other claims are now barred by our recent en banc decision in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003) ("*MCIMetro* II").

This suit was brought by Covad, a DSL Internet service provider, against BellSouth, a regional telephone service provider that also sells DSL service. Covad and BellSouth entered into an interconnection agreement pursuant to the 1996 Federal Telecommunications Act ("FTCA") to allow Covad to provide DSL service over BellSouth's existing telephone lines. Covad alleged that BellSouth had engaged in exclusionary conduct that violated the Sherman Antitrust Act, the FTCA, and various state anti-monopoly statutes. Covad also made various state breach of contract and tortious interference with business relations claims.[1]

On BellSouth's 12(b)(6) motion to dismiss for failure to state a claim, the trial judge threw out all of the counts relating to the Sherman Act except for two, allowing Covad to proceed with its allegations of predatory advertising and

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[1] Only one of Covad's twenty-four counts relied directly and explicitly on the FTCA: count four, misappropriation of confidential customer information.

monopoly leveraging. The district court also allowed Covad's counts under state antitrust law and state law for tortious interference with business relations.[2] All other causes of action, the district court found, addressed conduct implicated by the FTCA, and as such failed to state claims under the Sherman Act.

On appeal, we held first that the FTCA's savings clause,[3] as well as evidence of congressional and executive intent, unambiguously showed that there was no plain repugnancy between the FTCA and the Sherman Act, and thus that there could be no implied repeal of or immunity from the antitrust laws.

Second, in reviewing the district court's ruling that Covad had failed to state an antitrust claim, we found that Covad's causes of action under the Sherman Act fell into three kinds of alleged anticompetitive conduct: denial of the use of "essential facilities" (the network of phone lines); a refusal to deal; and price squeezing.[4] The first two categories of conduct (essential facilities and refusal to deal) relied on the same set of alleged facts: sometimes an outright denial of access to BellSouth's network and facilities, sometimes a denial of access on reasonable terms, with monopolistic

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[2] The parties later stipulated to the dismissal with prejudice of all of these surviving counts. A judgment dismissing the action in its entirety was issued on October 11, 2001.

[3] The FTCA provides that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Telecommunications Act of 1996, sec. 601(b)(1), § 152 note, 110 Stat. 56, 143 (1996).

[4] We treated Covad's monopoly leveraging claim as a theory that applied to all three categories of BellSouth's alleged anticompetitive conduct, rather than as a distinct count. As for Covad's predatory advertising claim, we note only that *Trinko* does not seem to bar Covad from proceeding with this cause of action, assuming that it not implicate any duties under the FTCA.

intent. We concluded that, on a motion to dismiss, Covad had pleaded facts sufficient to meet the "exceedingly low" threshold for stating an antitrust claim with respect to all three categories of conduct. *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 995 (11th Cir. 1983). We also reversed the district court's dismissal of Covad's breach of contract, FTCA, and tortious interference with business relations claims.[5] We now revisit Covad's claims in light of *Trinko.*

I. *Trinko*

We begin by noting that the Court in *Trinko* approved our view that the FTCA savings clause barred a finding of implied antitrust immunity. *Trinko,* 124 S.Ct. at 878. Thus, it is now clear that the FTCA and the Sherman Act were expressly intended to coexist. Emphasizing that the FTCA also does not create new claims that go beyond existing antitrust standards, *id.*, the Court then proceeded to consider whether the conduct of which Trinko complained violated the Sherman Act.

Trinko originated in a complaint brought by AT&T and other competitive local exchange carriers ("CLECs") before the New York Public Service Commission ("PSC") and the Federal Communications Commission ("FCC"). The complaint alleged that Verizon, the incumbent LEC in New York state, had failed to fulfill its obligations under 47 U.S.C.

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[5] The district court dismissed the breach of contract and FTCA claims for lack of jurisdiction, finding that they must first be presented to state public service commissions (PSCs). In reversing these dismissals, we relied on *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs. Inc.*, 278 F.3d *1223* (11th Cir. 2002) *("MCIMetro* I"), which held that the state PSCs did *not* have jurisdiction to interpret and enforce interconnection agreements under the FTCA. Having found that the FTCA savings clause did not supersede other state or national laws, we reversed the trial judge's dismissal of the state law tortious interference claims as preempted by the FTCA.

§ 251(c)(3) to provide access to Verizon's operations support systems ("OSS"), one of several "unbundled network elements." OSS access allows a CLEC to relay orders for service through an electronic interface with Verizon's ordering system, thus enabling a CLEC to fill its customers' orders. Trinko alleged that Verizon had delayed the filling of, or neglected to fill at all, CLEC customer orders. The FCC and the New York PSC opened parallel investigations of Verizon that led to a series of PSC orders and an FCC consent decree. The day after Verizon entered its consent decree with the FCC, one of AT&T's customers, the Trinko law firm, brought a claim under § 2 of the Sherman Act. Trinko argued that Verizon's failure to fulfill its § 251(c)(3) obligations was part of an anti-competitive scheme to discourage customers from becoming or remaining clients of CLECs. Such conduct, Trinko alleged, constituted a refusal to deal with rival firms under § 2 of the Sherman Act. As the Supreme Court describes it, Trinko's complaint set forth only a single example of the alleged failure to provide adequate access: the discriminatory handling of CLEC customer orders that led to the PSC and FCC investigations.

The Court held, first, that Trinko failed to state a recognized Sherman Act claim under existing refusal-to-deal precedents. *Trinko,* 124 S.Ct. at 880. The Court found that Verizon's failure to provide OSS assistance to AT&T did not amount to an effort at monopolization. Rejecting Trinko's reliance on *Aspen,* the Court noted that *Aspen* was "at or near the outer boundary of § 2 liability." Id. at 879. The case before the Court involved none of the *Aspen* indicators of anticompetitive conduct and so did not fit within *Aspen's* "limited exception." *Id.* at 880.

In particular, the Court observed that *Aspen* involved a unilateral termination of a "voluntary *(and thus presumably profitable)* course of dealing." *Id.* (emphasis in original). But Trinko's complaint, the Court noted, "does not allege that

Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion." Thus, Verizon's "prior conduct sheds no light upon the motivation of its refusal to deal." *Id.* Furthermore, the two cases differed in terms of pricing behavior. In *Aspen* the defendant's rejection of an offer to sell its services to a competitor *"even if compensated at retail price," id.* (emphasis in original), could support the requisite inference of monopolistic intent. By contrast, Verizon's reluctance to interconnect at the cost-based rate of compensation under §251(c)(3) is a neutral fact that does not support an inference of monopolistic intent. *Id.*

More fundamentally, the Court found that *Aspen* involved a defendant whose failure to sell even at retail cost to a competitor was a failure to sell *otherwise publicly marketed services.* In the case before it, the *Trinko* Court noted, "the services allegedly withheld are not otherwise marketed or available to the public." *Id.* at 880. The FTCA had created a "brand new" sharing obligation: "the wholesale market for leasing network elements." Id. (quoting *Verizon Communications v. FCC,* 535 U.S. 467, 528 (2002)).

In support of its § 2 claims, Trinko also argued that Bell Atlantic failed to provide AT&T with access to its "essential facilities." The *Trinko* Court rejected this argument to the extent that it was distinct from Trinko's general § 2 argument. *Trinko,* 124 S.Ct. at 881. Despite having been invoked by some lower courts, observed Justice Scalia, this doctrine has never been recognized by the Supreme Court as established law, and in any case AT&T was not in fact deprived of such access. *Id.* at 880-81 (relying on P. Areeda & H. Hovenkamp, *Antitrust Law* (2003 Supp.), for the proposition that essential facilities claims should be denied where a state or federal agency has the power to compel and regulate sharing).

In the final part of its opinion, the Court observed that the FTCA created a broad and detailed regulatory environment

that effectively abrogated the need for antitrust scrutiny in the case before it. The PSC and FCC investigations, orders, and consent decree in *Trinko* showed that the FTCA's distinctive regulatory regime was working just as Congress intended it to. The Court stated that federal courts are ill-equipped to handle cases alleging violations of 251(c)(3) duties to provide access because such allegations involve complex and constantly changing interactions between competitive and incumbent LECs. Antitrust courts should not be in the business of supervising highly detailed decrees on an ongoing basis. The Court noted that the FTCA does not authorize judges to invoke the Sherman Act in this context; rather, the 1996 act is itself an effective and even more ambitious mechanism for regulating the telecom industry. *Trinko,* 124 S. Ct. at 881-83. The FTCA attempts nothing less than to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises." *Id.* at 883 (quoting *Verizon,* 535 U.S. at 476). By contrast, § 2 of the Sherman Act seeks merely "to prevent *unlawful monopolization." Trinko,* 124 S. Ct. at 883 (emphasis in original).[6]

II. Covad's Claims after *Trinko*

As noted, we grouped Covad's Sherman Act claims into three forms of alleged anticompetitive conduct: refusal to deal, essential facilities, and price squeezing.

Trinko requires us, first, to reconsider whether Covad's refusal-to-deal allegations, if true, would state an antitrust claim under the "limited exception" of *Aspen. Trinko,* 124 S. Ct. at 880. In our earlier opinion, we distinguished *Aspen* from the instant case by noting that Covad was both customer and competitor of BellSouth, whereas the *Aspen* parties were solely competitors of each other. *Trinko,* however, treats the

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[6] In a concurring opinion, Justices Stevens, Souter, and Thomas found that Trinko had no standing to bring an antitrust claim in this case. Only AT&T could do so.

interconnection agreement between AT&T and Verizon as a mandatory accord between competitors, not a voluntary agreement between customers. *Trinko,* 124 S. Ct. at 880. That Verizon also supplies wholesale unbundled network elements at a cost-based rate to AT&T does not, in the Court's view, make the relationship a non-competitive one. Moreover, *Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen.* The relationship between AT&T and Verizon was mandated by the FTCA, and thus cannot be said to have initiated a "voluntary" course of dealing, profitable or otherwise. For the same reason, Verizon cannot be said to have failed to make available to AT&T otherwise publicly marketed services, whether at retail or a lower cost. *Trinko* emphasizes the coercive effect of the FTCA on incumbent LECs such as Verizon who—but for the FTCA—would not be required to make their network elements (including OSS) available to third parties such as AT&T. In short, Covad's refusal-to-deal claims do not survive *Trinko* and must be dismissed.

We consider next whether our application of the essential facilities doctrine to Covad's claims under this theory satisfies *Trinko.* Our earlier opinion quoted *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic,* 65 F.3d 1406, 1413 (7th Cir. 1995), to the effect that the essential facilities doctrine has been endorsed by the Supreme Court and remains valid until rejected by it. In *Trinko,* however, the Court stated that it would neither endorse nor reject the essential facilities doctrine. *Trinko,* 124 S.Ct. at 881. By contrast, the Court does endorse the view of two antitrust scholars that the doctrine is only viable where there is indeed unavailability of access. Id. Where a state or federal agency is authorized to compel access to a competitor's infrastructure, as under the FTCA, *Trinko* states that an essential facilities claim should be denied. *Id.* Thus, Covad's allegations under the essential facilities doctrine also fail to survive *Trinko.*

Third, we must consider whether Covad's price squeezing allegations are now a matter for FTCA regulatory enforcement rather than antitrust law. As to these allegations, *Trinko* does not offer any definitive guidance. The plaintiffs' amended complaint in *Trinko* did not state any price squeezing claims, and the Court did not specifically address the issue in its opinion. BellSouth argues that the Fourth Circuit dismissed a price squeezing claim similar to Covad's in *Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, 330 F.3d 176, 181, 190 (4th Cir. 2003), and that the Supreme Court's denial of certiorari in that case, 124 S. Ct. 1144 (2004), supports affirming the district court's judgment in the instant case. But the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 43 S.Ct. 181, 182 (1923).

We believe Covad's price squeezing claim survives because it is based on traditional antitrust doctrine and is not specifically barred by *Trinko*. As such, however, Covad's complaint must contain allegations that the two basic prerequisites for a showing of price predation under § 2 of the Sherman Act have been met. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (finding that the prerequisites for recovery on a claim of price predation under § 2 of the Sherman Act are the same as those for recovery on a claim of price discrimination under the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(a)). First, Covad must allege that "the prices complained of are below an appropriate measure of its rival's costs." *Brooke Group*, 509 U.S. at 222. Second, Covad must allege that BellSouth had "a dangerous probability[] of recouping its investment in below-cost prices." *Id.* at 224. Rereading Covad's complaint, we find that the allegations contained therein, although not as closely tied to these two prerequisites as they could have been, are sufficient to state a claim under § 2 of the Sherman Act.

With respect to the first requirement, Covad alleges that

> The wholesale prices BellSouth offers to ISPs for DSL service, as well as its retail prices for combined DSL and Internet access service, are set so low relative to its unbundled wholesale loop prices that Covad cannot meet BellSouth's wholesale or retail prices and still make a reasonable return on its investment. If Covad charged retail DSL/Internet access customers the same price as BellSouth does, or charged comparable wholesale DSL prices, Covad could not recover the cost of providing the service, e.g., loop costs, collocation costs, transport costs, corporate overhead and sales and market costs.

Covad Complaint at ¶ 92. Whether the last sentence in this passage reflects "an appropriate measure of [BellSouth's] costs," *Brooke Group,* 509 U.S. at 222, is a factual matter for the district court to determine at a later stage of proceedings. For purposes of the pleading stage, Covad's complaint meets the first *Brooke Group* prerequisite for a showing of price predation.

With respect to the recoupment requirement, Covad alleges that

> If BellSouth had charged itself the same wholesale price for loops, BellSouth could not make a profit from its DSL service at current prices. . . BellSouth achieves the unlawful price squeeze by allocating costs so as to apportion only *a de minimis* cost to the loops over which it provides its own DSL service. . . As the costs are presently allocated, BellSouth must necessarily realize a significantly higher profit margin on its wholesale sales (for which it faces no competition) than it does on the corresponding retail sales (for which Covad is attempting to compete). BellSouth intended this artifical cost allocation to harm Covad, and it did.

Covad Complaint at ¶¶ 93-95. These allegations suggest that BellSouth is compensating for deliberately reduced profits on

the retail end of its operations with correspondingly greater profits on the wholesale side, in order to stifle competition from firms such as Covad that are both wholesale customers and retail rivals. We find that these allegations are sufficient to allege "a dangerous probability" that BellSouth will "recoup[] its investment in below-cost prices." *Brooke Group,* 509 U.S. at 224. Whether the facts contained in Covad's complaint and in the record will bear out the recoupment allegation against BellSouth is also a matter for the district court to determine at a later stage, not on the basis of a motion to dismiss for failure to state a claim. Taken together, Covad's price predation allegations meet the "exceedingly low" threshold of sufficiency that a complaint must meet to survive a 12(b)(6) motion. *Quality Foods,* 711 F.2d at 944-95 (finding that "we must accept the facts pleaded as true and construe them in a light favorable to plaintiffs").

Nor are Covad's price squeezing claims barred by *Trinko's* discussion of the FTCA's regulatory priority over antitrust law enforcement. See *Trinko,* 124 S.Ct. at 882 (finding the FTCA regime to be "an effective steward of the antitrust function"). The *Trinko* Court observed that federal courts are ill-equipped to manage the complicated disputes over § 251(c)(3) duties that frequently arise out of telecom interconnection agreements. Id. at 882-83 (finding that the costs of antitrust intervention in this context exceed the benefits and stating that "[a]n antitrust court is unlikely to be an effective day-to-day enforcer of [the FTCA's] detailed sharing obligations"). Instead, courts should defer to the FTCA's preexisting regulatory framework rather than try to adjudicate complex Sherman Act lawsuits in the telecommunications area.

Here, we find that Covad's price squeezing claims depend upon Covad's FTCA-mandated interconnection agreement with BellSouth only in a circular sense. Covad alleges that the wholesale prices BellSouth charges ISPs for DSL service, and

the retail prices it charges individual customers for combined DSL and Internet access service, are significantly lower than the unbundled wholesale loop prices BellSouth charges Covad and other CLECs pursuant to the interconnection agreement. If it is true that the wholesale prices BellSouth is charging ISPs for DSL service, and the retail prices it is charging individual customers for combined DSL and Internet service, are "below an appropriate measure of [BellSouth's] costs," *Brooke Group,* 509 U.S. at 222, that fact suffices to satisfy the first prong of a price predation offense under § 2 of the Sherman Act. As noted above, whether the unbundled wholesale loop prices BellSouth charges Covad pursuant to the interconnection agreement are the "appropriate measure of [BellSouth's] costs" is a matter for the trier of fact to determine. That these two measures may be the same does not somehow immunize BellSouth from the application of traditional antitrust principles. The unbundled wholesale loop prices that BellSouth charges Covad are made available to Covad pursuant to § 251(c)(3) and § 252 of the FTCA. Section 251(c)(3) requires BellSouth

> to provide . . . nondiscriminatory access to network elements on an unbundled basis . . . on rates . . . that are just, reasonable, and nondiscriminatory in accordance with . . . this section and section 252 of this title.

Section 252(d)(1), in turn, provides that

> [d]eterminations by a State commission of the just and reasonable rate for . . . network elements for purposes of subsection (c)(3) of [section 251] shall be based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the .. . network element . . . and nondiscriminatory, and may include a reasonable profit.

As this language makes clear, the FTCA employs the same baseline standard—namely, "cost"—for determining the

validity of an ILEC's prices as does the *Brooke Group* antitrust test of price predation, which asks whether "the prices complained of are below an appropriate measure of its rival's costs." *Brooke Group,* 509 U.S. at 222. Thus, the at-cost measure that Covad invokes for purposes of stating a predatory pricing claim is tied to the FTCA only in a very formal, circular sense. To say that Covad's price squeezing claim defines the "appropriate measure of [BellSouth's] costs," id., in terms of an obligation created by the FTCA is to say very little when the FTCA itself relies upon "cost" as the appropriate measure by which to determine interconnection and network element rates. We conclude that Covad's price squeezing claim is based on traditional antitrust standards. As the *Trinko* Court noted, while the FTCA "does not create new claims that go beyond existing antitrust standards," it also "preserves claims that satisfy existing antitrust standards." *Trinko,* 124 S.Ct. at 878. Our responsibility under *Trinko* to harmonize the Sherman Act and the FTCA does not entail excluding facially valid antitrust claims at the pleadings stage.[7]

We turn next to Covad's FTCA and state law breach of contract causes of action. Neither of these is affected by the *Trinko* decision. As noted earlier, the district court dismissed these claims on the ground that they must first be brought before a state PSC. In our initial opinion in this case, we

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[7] It is true that the same set of facts that Covad cites in support of its price squeezing claim might also be actionable under the FTCA. If BellSouth has sold (or is now selling) wholesale DSL service to ISPs at prices lower than those it charges Covad, as Covad alleges, BellSouth may well have violated the § 252(d)(1) requirement of "nondiscriminatory" pricing for unbundled network elements. But such a claim—which Covad has not made in this case – would involve a dispute over the terms of the FTCA-mandated interconnection agreement between BellSouth and Covad. As we explain below, pursuant to *MCIMetro II,* a claim directly under the FTCA must be brought in the first instance before the relevant state PSCs.

reversed the trial court's dismissal in light of our holding in *MCIMetro I,* 278 F.3d at 1237 (holding that state PSCs are not authorized by § 252 of the FTCA to interpret interconnection agreements). In a subsequent en banc opinion, however, we overturned this judgment and held that state PSCs do have jurisdiction to adjudicate disputes over and interpret the terms of FTCA-mandated interconnection agreements. *MCIMetro II,* 317 F.3d 1270. Covad may now bring those claims before the relevant state PSCs, and judicial review of state PSC determinations is available in the federal courts pursuant to 47 U.S.C. § 252(e)(6). Accordingly, we now affirm the trial court's dismissal of Covad's FTCA and state law breach of contract causes of action.

Finally, we find that Covad's state law claims for tortious interference with business relations are wholly untouched by *Trinko.* These claims do not implicate any obligations arising under Covad's interconnection agreement with *BellSouth,* and so Covad may proceed with those claims after *Trinko* as before.

To summarize, in light of *Trinko* we now affirm the district court's dismissal of Covad's refusal to deal and essential facilities claims. In light of *MCIMetro II,* we now also affirm the district court's dismissal of Covad's FTCA and state law breach of contract claims. As in our earlier opinion, however, we reverse the district court's dismissal of Covad's price squeezing and tortious interference with business relations claims. This case is now remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 27, 2004]

No. 01-16064-CC

COVAD COMMUNICATIONS COMPANY, DIECA COMMUNICATIONS, INC., d.b.a. Covad Communications Company,
Plaintiffs-Appellants,

versus

BELLSOUTH CORPORATION, BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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BEFORE: BARKETT and MARCUS, *Circuit Judges*, and HIGHSMITH*, *District Judge*

PER CURIAM:

The petition(s) for rehearing filed by Appellants is DENIED.

ENTERED FOR THE COURT:

/s/ [ILLEGIBLE]
UNITED STATES CIRCUIT JUDGE

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* Honorable SHELBY HIGHSMITH, United States District Judge for the Southern District of Florida, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 27, 2004]

No. 01-16064-CC

COVAD COMMUNICATIONS COMPANY, DIECA COMMUNICATIONS, INC., d.b.a. Covad Communications Company,
Plaintiffs-Appellants,

versus

BELLSOUTH CORPOMTION, BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____ 11th Cir., 19__, ___ F.2d_____).

Before: BARKETT and MARCUS, *Circuit Judges*, and HIGHSMITH*, *District Judge*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

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* Honorable Shelby Highsmith, United States District Judge for the Southern District of Florida, sitting by designation.

of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [ILLEGIBLE]
UNITED STATES CIRCUIT JUDGE

APPENDIX C

SUPREME COURT OF THE UNITED STATES

02-1423

BELLSOUTH CORP., ET AL.

v.

COVAD COMMUNICATIONS CO.

January 20, 2004, Decided

JUDGES: REHNQUIST, STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, BREYER.

OPINION: The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. ___, 2004 U.S. LEXIS 657 (2004).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16064

COVAD COMMUNICATIONS COMPANY, DIECA COMMUNICATIONS, INC., d.b.a. Covad Communications Company,
Plaintiffs-Appellants,

versus

BELLSOUTH CORPORATION, BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendants-Appellees.

August 2, 2002, Decided

JUDGES: Before BARKETT and MARCUS, *Circuit Judges*, and HIGHSMITH*, *District Judge*.

OPINION: BARKETT, *Circuit Judge*:

Covad Communications Company and Dieca Communications, Inc. (collectively "Covad")[1] appeal the district court's dismissal, pursuant to *Federal Rule of Civil Procedure* 12(b)(6), of their action against BellSouth Corporation and BellSouth Telecommunications Corporation (collectively "BellSouth"). Covad is a seller of high-speed Digital Subscriber Line ("DSL") internet service. BellSouth is a regional

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* Honorable Shelby Highsmith, U.S. District Judge for the Southern District of Florida, sitting by designation.

[1] Dieca is a wholly-owned subsidiary of Covad.

telephone service and telecommunications provider, which also sells DSL service. Covad and BellSouth have entered into an "interconnection agreement" to allow Covad to provide DSL service to consumers over BellSouth's existing telephone lines. However, Covad alleges that BellSouth has attempted to stifle competition both by failing to live up to its contractual obligations and through broad exclusionary behavior, including the use of price squeezes, misleading advertising, and the misuse of Covad's confidential customer information. Covad's 24-count complaint asserts that BellSouth's actions violated the Sherman Antitrust Act, the Telecommunications Act of 1996, state antimonopoly statutes and unfair competition laws, and state law of breach of contract. On appeal, Covad argues that the trial court erred in dismissing Covad's complaint. We agree and REVERSE.

BACKGROUND

BellSouth is the incumbent local exchange carrier ("ILEC") that inherited monopoly control over the local telephone network in a nine-state region after the breakup of AT&T in 1983. Covad, formed in 1996, sells high speed DSL service, a technology that allows consumers and businesses to transmit and receive data over existing copper phone lines. Covad's DSL service competes directly with BellSouth's own DSL and other retail data services, such as dial-up internet access, Internet Services Digital Network ("ISDN") and dedicated line services such as "Frame Relay" and "T-1."

As Covad explains it,[2] to bring its services to consumers in BellSouth's region, Covad must have dependable, timely, and affordable access to the local telephone network controlled by

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[2] Because in this appeal we review de novo the district court's grant of a motion to dismiss Covad's complaint, we take the facts as they are alleged in Covad's complaint. *See Quality Foods de Centro Am., S.A. v. Latin Am. Agri-business Dev. Corp.*, S.A., 711 F.2d 989, 994-95 (11th Cir. 1983).

BellSouth. Because of the ubiquitous nature of the local telephone network, the facilities controlled by BellSouth cannot practicably be duplicated. Thus, to operate feasibly, Covad must be able to "interconnect" its DSL network with BellSouth's local telephone network, which means, at its most basic, that Covad needs to be able to connect its wires to the BellSouth wires that make up the local telephone network.

Congress recognized that new companies seeking entry into the market could not compete if they had to duplicate existing telephone networks, and addressed this concern by passing the Telecommunications Act of 1996 (the "1996 Act"), which requires, among other things, that ILECs allow competitors to interconnect with their networks. The centerpieces of the 1996 Telecommunications Act are sections 251[3] and 252,[4] codified at 47 U.S.C. §§ 251 and 252, which together impose a series of affirmative duties on ILECs like BellSouth, for the benefit of competitive local exchange carriers ("CLECs") like Covad. Sections 251 and 252 also

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[3] Section 251 imposes various duties on all local exchange carriers ("LECs"): to permit the resale of their telecommunication services; to provide number portability; to provide dialing parity to other LECs; to afford other LECs access to poles, ducts, conduits, and rights-of-way; and, most significantly here, to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b). Section 251 also imposes additional obligation on ILECs, including the duty to interconnect their networks with that of any requesting telecommunications carriers "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory," and to negotiate in good faith the agreements establishing the rates, terms, and conditions of these interconnections. 47 U.S.C. § 251(c)(1) and (2).

[4] Section 252 provides for the negotiation, arbitration, and approval of inter-connection agreements and requires all parties to participate in any arbitration. 47 U.S.C. § 252(b)(1) and (5). All interconnection agreements adopted by negotiation or arbitration must be submitted for approval to the respective state public service commission ("PSC"). 47 U.S.C. § 252(e).

establish the standards for the arbitration and approval of interconnection agreements between ILECs and CLECs.

Pursuant to the 1996 Act, Covad entered into a contract in 1998 with BellSouth (the "Interconnection Agreement") in which Bell-South agreed, among other things: (1) to allow Covad to "collocate" (place Covad's equipment) in BellSouth central offices throughout its region, providing interconnection between the network controlled by BellSouth and Covad's network; (2) to provide interoffice transport facilities (high capacity connections necessary to connect Covad's equipment in various central offices); (3) to provide nondiscriminatory access to operational support systems ("OSS") to allow Covad to place orders for facilities; and (4) to provide loops (the actual copper wires used for DSL transmission).

In this suit, Covad alleges that Bell South aimed to stifle competition and protect and extend its local telephone monopoly, in violation of the Interconnection Agreement and the antitrust laws, by embarking on a series of dilatory, anticompetitive acts designed to prevent or delay Covad's entry into the DSL market, impede its ability to deliver service to consumers, and drive Covad from the marketplace. In particular, Covad alleges that BellSouth regularly misrepresented the availability of space in BellSouth's central offices so as initially to effectively deny collocation altogether. When it did permit collocation, BellSouth allegedly raised Covad's costs unnecessarily and systematically and in bad faith denied and delayed facilities essential to Covad's success, including interoffice transport, OSS, and local loops, resulting in delays and lost customers. Covad also asserts that BellSouth manipulated its dual role as both Covad's wholesale supplier (of local exchange elements) and its retail competitor (for DSL) by engaging in a "price squeeze"—an intentional pattern of pricing wholesale inputs at such a high level that Covad (or indeed BellSouth itself) cannot absorb

those costs and still compete profitably in the downstream retail markets. By assigning inordinately high costs to its wholesale offerings, and inordinately low costs to its retail offerings, BellSouth allegedly squeezed out competitors such as Covad, clearing the field for its own retail services.

Furthermore, Covad alleges that BellSouth strategically under-staffed its wholesale division, which BellSouth created to serve customer-competitors like Covad. This strategy slowed down order processing and created backlogs that, at times, included over 5,000 Covad orders. By refusing to develop adequate systems for placing wholesale orders, BellSouth thwarted Covad's aggressive first-to-market strategy, caused Covad to lose customers, impeded Covad's ability to deliver high quality service, and protected BellSouth's monopoly.

Finally, Covad alleges that BellSouth acted with clear motive and intent to destroy DSL competition and competitors like Covad. Covad asserts that BellSouth possessed DSL technology, but did not offer it to the public as a means of internet access until forced to do so in competition with Covad; BellSouth preferred to offer more profitable alternatives such as ISDN or T-1 service, at the expense of consumer choice. When Covad threatened to compete for internet access customers with DSL, a cheaper and more convenient service, BellSouth itself began an aggressive campaign to offer DSL. BellSouth confirmed its anti-competitive intent, Covad says, by falsely disparaging Covad's services and using confidential Covad information to solicit its customers. Covad states that BellSouth's scheme has had the intended effect of denying Covad access to the local internet access markets, substantially lessening competition and consumer choice in those markets, creating higher prices, and stifling innovation.

These actions, according to Covad, violate the 1996 Act, the Sherman Act, and various state laws. The district court,

relying on the Seventh Circuit's opinion in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), dismissed Covad's Sherman Act claims, holding that allegations that are based on duties established by the 1996 Act cannot form the basis of a violation of the Sherman Act because (1) "'affirmative duties to help one's competitors . . . do not exist under the unadorned antitrust laws,'" D.C. Opinion at 15 n. 8 (quoting *Goldwasser*, 222 F.3d at 400); (2) "the 'elaborate enforcement structure' of the 1996 Act precludes suits under the Sherman Act for ILEC duties because 'antitrust laws would add nothing to the oversight already available under the 1996 law,'" *id.* at 15 (quoting *Goldwasser*, 222 F.3d at 400-01); and (3) even if such allegations could be entirely divorced from the 1996 Act context, such claims nonetheless would not constitute "allegations of a freestanding antitrust claim" because "'the elaborate system of negotiated agreements and enforcement established by the 1996 Act'" should not be "'brushed aside by any unsatisfied party with the simple act of filing an antitrust action.'" *Id.* at 16-17 (quoting *Gold-wasser*, 222 F.3d at 401). [5]

Turning to Covad's claims under Section 222 of the 1996 Act and for breach of contract, the district court found that, because state commissions have the power not only to approve interconnection agreements "but to later interpret and enforce them as well," "sections 206 and 207 do not grant federal courts jurisdiction . . . when claims directly implicate the regulatory scheme of the 1996 Act," except for the power to review "a determination by a [state commission]." *Id.* at

[5] The district court, however, did not dismiss Covad's antitrust claims in their entirety; it found that allegations that "BellSouth engaged in predatory advertising and promotion" could support an antitrust violation and dismissed these claims only to the extent that they alleged misuse of proprietary information, a subject that is "covered by paragraph 9 of the Interconnection Agreement." D.C. Opinion at 29-31. The court also declined to dismiss Covad's "monopoly leveraging" claim to the extent it was based on conduct "not implicated by the 1996 Act." *Id.* at 33.

37-38. Because Covad's claims "relate directly to duties under the 1996 Act or the interconnection agreement, which are to be first reviewed and enforced by the respective [state commissions]," the court dismissed those claims. *Id.* at 38. Finally, the court dismissed Covad's tort claims for interference and unfair competition to the extent they involved any allegation other than "improperly soliciting customers not to enter into contracts with Covad or to breach existing contracts, [and] disparaging Covad's products and services." *Id.* at 40.[6] The trial court rejected the bulk of Covad's tort claims because they "are merely a restated breach of contract claim which the court has already dismissed for the reasons noted above." *Id.*

We review a district court's dismissal of a complaint de novo. In particular, "whether specific conduct is anti-competitive is a question of law reviewed de novo." *Smile-Care Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996). "'[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 953 (11th Cir. 1986) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). This Court "must accept the facts pleaded as true and construe them in a light favorable to plaintiffs." *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, S.A., 711 F.2d 989, 994-95 (11th Cir. 1983). Rule 12(b)(6) dismissals are particularly disfavored in fact-intensive antitrust cases. In Quality Foods, which involved claims under sections 1 and 2 of the Sherman Act, this Court stated that "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." 711 F.2d at 994.

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[6] The tort claims not dismissed by the district court were subsequently dis-missed by stipulation and are not part of this appeal.

"Although authorized by the Federal Rules of Civil Procedure, the liberal rules as to the sufficiency of a complaint make it a rare case in which a motion [to dismiss] should be granted." *St. Joseph's Hosp.*, 795 F.2d at 953 (footnote omitted).

DISCUSSION

I. Sherman Act Claims

We turn first to the question of whether the litany of facts pleaded in Covad's complaint, if taken as true, state a cause of action for the violation of the Sherman Act. Answering this question requires a two-tiered inquiry. First, we must determine whether the 1996 Act's regulation of local telecommunications markets precludes application of the Sherman Act so that a claim based on facts "inextricably linked" to an alleged violation of the 1996 Act can never, as a matter of law, form the basis of an independent Sherman Act claim. If we conclude that the 1996 Act precludes "inextricably linked" antitrust claims, then our inquiry is at an end. However, if such a claim can stand as an independent Sherman Act claim, then we must determine whether the allegations in Covad's complaint adequately allege a violation of the Sherman Act.

A. Does the 1996 Act Preempt All Sherman Act Claims?

As a general principle, a statute does not automatically limit causes of action under another statute, and conduct that is alleged to violate one statute can also violate another, subjecting the perpetrator to liability for the violation of each. Moreover, the same conduct may support various theories of liability and expose the perpetrator to different types of damages. At the same time, Congress can determine the contours and extent of the remedy for specific conduct it determines to be unlawful and accordingly limit the causes of action for such conduct. While such congressional limitations

can be established explicitly, courts have also determined that if two statutes are deemed to be plainly repugnant to each other, then Congress has implicitly limited one or the other. However, we must be mindful that courts should be reluctant to imply a limitation resulting in antitrust immunity. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976). "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963) (footnotes omitted).

The initial question before us in this case is whether Congress intended in the 1996 Act to provide immunity from antitrust violation claims for conduct covered in that Act. We begin by examining the plain language of the 1996 Act to determine whether it expresses any intention to preempt Sherman Act antitrust claims for conduct that is inextricably linked to the 1996 Act. Our examination reveals that, rather than preemptive language, Congress specifically and directly stated that the two Acts were intended to be used in tandem to accomplish the congressional goals served by both acts—namely, the stimulation of competition.[7] Congress explicitly stated—both through a savings clause directed specifically at antitrust enforcement and through an additional general savings clause—that the 1996 Act does not supplant or change the antitrust laws. The 1996 Act provides:

> SAVINGS CLAUSE . . . nothing in this Act or the amendments made by this Act shall be construed to

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[7] The purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." *H.R. Conf. Rep.* 104-458, 1996 WL 46795, at *1 (1996).

> modify, impair, or supersede the applicability of any of the antitrust laws.
>
> NO IMPLIED EFFECT . . . This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments.

Telecommunications Act of 1996, sec. 601(b)(1), (c)(1), § 152 note, 110 Stat. 56, 143 (1996) (emphasis added). Thus, in enacting the 1996 Act, Congress did not explicitly supersede the salience of the antitrust laws in the telecommunications industry.

It is clear that plain repugnancy cannot be found between the 1996 Act and the antitrust laws in view of the 1996 Act's express language reserving the applicability of the antitrust laws. An act that expressly preserves the antitrust laws' applicability and fully subjects anticompetitive activities to them cannot be read to impliedly repeal those laws. We agree with the Second Circuit that the "savings clause unambiguously establishes that there is no 'plain repugnancy' between the Telecommunications Act and the antitrust statutes [and thus] that the Telecommunications Act does not provide an 'implicit immunity' from the antitrust laws.'" *Law Offices of Curtis V. Trinko v. Bell Atl. Corp.*, 294 F.3d 307 (2d Cir. 2002). We conclude that the plain statutory language is sufficient to end our inquiry on this matter. *CBS Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) ("When the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete.") (brackets in original) (citations omitted).

However, should there be any doubt that the plain language of the savings clause resolves the issue, we find support for our conclusion in the legislative history surrounding the 1996

Act, reflecting that the President, the Congress, the Department of Justice, and the FCC have emphasized the critical need for the antitrust laws to work in conjunction with the 1996 Act in order to spur competition in the telecommunications industry. For example, the Senate Report analyzing the bill specifically provided: "The provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill." S. Rep. No. 104-23, at 17 (1995) (R2-7-A18). Thus, the savings clause "prevents affected parties from asserting that the bill impliedly preempts other laws." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, S. Rep. No. 104-230, at 201 (1996) ("Conference Report"). Throughout the legislative record, Congress repeatedly emphasized that ILECs like BellSouth remain subject to antitrust enforcement:

> Antitrust law is synonymous with low prices and consumer protection—and that is exactly what we need in our tele-communications industry . . . . The bill contains an all-important antitrust savings clause which ensures that any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws. . . . And by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers.

142 Cong. Rec. H1145-06 (daily ed. February 1, 1996) (statement of Rep. Conyers).

> The second important antitrust issue in this legislation is the unequivocal antitrust savings clause that explicitly maintains the full force of the antitrust laws in this vital industry. Today we take for granted that the antitrust laws apply to the communications sector. . . . Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation

> that it fosters, can flourish to benefit consumers and the economy.

142 Cong. Rec. S687-01 (daily ed. February 1, 1996) (statement of Sen. Thurmond).

> I firmly believe that we must rely on the bipartisan principles of antitrust law in order to move as quickly as possible toward competition in all segments of the telecommunications industry, and away from regulation. Relying on antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry.

141 Cong. Rec. S18586-01 (daily ed. December 14, 1995) (statement of Sen. Leahy).

Former President Clinton again emphasized the importance of antitrust enforcement when he signed the 1996 Act into law:

> The Act's emphasis on competition is also reflected in its antitrust savings clause. This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemaking or orders, the antitrust laws continue to apply fully.

Statement by President William J. Clinton upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (February 8, 1996), reprinted in 1996 U.S.C.C.A.N. 228-1, 228-3. Thus, both the legislative and executive branches recognized that the antitrust laws would coexist alongside the Act.

Finally, in implementing sections 251 and 252 of the 1996 Act (governing the arbitration for and approval of interconnection agreements between ILECs like BellSouth and CLECs like Covad), the FCC formally acknowledged that its regulations did not provide the "exclusive remedy" for anticompetitive conduct. First Report and Order, In re Implementation of the Local Competition Provisions in the

Telecommunications Act of 1996, 11 F.C.C.R. 15499, P 124 (Aug. 8, 1996) (R2-7-A174). The FCC emphasized that, in addition to judicial review of arbitrations setting the terms of inter-connection agreements, "parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252," *id.*, expressly including private antitrust enforcement: "We clarify . . . that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws." *Id.* at P 129 (R2-7-A175) (footnote omitted).

Thus, in view of the plain statutory language and the legislative pronouncements of the intended coexistence of the antitrust laws and the 1996 Act, we cannot agree with Goldwasser to the extent that it is read to say that a Sherman Act antitrust claim cannot be brought as a matter of law on the basis of an allegation of anti-competitive conduct that happens to be "intertwined" with obligations established by the 1996 Act. [8]

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[8] The Goldwasser court stated:

> Nevertheless, when one reads the complaint as a whole these allegations appear to be inextricably linked to the claims under the 1996 Act. Even if they were not, such a conclusion would then force us to confront the question whether the procedures established under the 1996 Act for achieving competitive markets are compatible with the procedures that would be used to accomplish the same result under the antitrust laws. In our view, they are not. The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes under the § 252 agreements. The 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.

Goldwasser, 222 F.3d at 401.

The district court interpreted this language to mean that a Sherman Act antitrust claim cannot ever be brought if it alleges conduct also covered by the 1996 Act. We disagree that Goldwasser stands for such a broad proposition, and note that Goldwasser tied its conclusion to the specific allegations of the complaint in that case. We do agree, however, with the Second Circuit in Trinko, when it concluded that "controlling case law does not support the theory that specific legislation meant to encourage competition necessarily takes precedence over the general antitrust laws," Trinko, ___F.3d at ___ (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)). The Second Circuit also noted that "it is unlikely that allowing antitrust suits would substantially disrupt the regulatory proceedings mandated by the Telecommunications Act." *Id.* While acknowledging that injunctive relief in such suits may require judicial restraint, the Trinko court stated that "awarding damages for the willful maintenance of monopoly power would not substantially interfere with the regulatory scheme envisioned by the Telecommunications Act," noting that in some instances, "it is possible that the antitrust laws will be needed to supplement the regulatory scheme" to bring competition to the local phone service markets. *Id.* at ___ (footnote omitted).

At the same time, we agree with Goldwasser that merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations. Thus, a claim that a defendant failed to live up to its contractual obligations under an agreement made pursuant to the 1996 Act in and of itself will be insufficient to establish an antitrust violation. However, if a plaintiff also pleads facts that, if true, tend to show an anticompetitive purpose to create or maintain a monopoly, then that plaintiff has pleaded an antitrust violation.[9] Because

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[9] In Goldwasser, the plaintiff pleaded 20 counts, seventeen of which explicitly cited violations of the 1996 Act. Goldwasser then alleged that "all of these practices . . . violate both § 2 of the Sherman Act, 15 U.S.C.

we believe that the 1996 Act does not preempt claims under the Sherman Act as a matter of law, we turn to the question of whether Covad has pleaded a valid antitrust claim.

B. Does Covad's Complaint Sufficiently Allege a Violation of the Sherman Act?

Establishing a Section 2 monopolization violation requires proof of two elements: "(1) the possession of monopoly power in the relevant market and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); accord *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481-83, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992). Monopoly power is defined as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). A firm that does not achieve monopoly power may nonetheless violate Section 2 through "attempted monopolization." Proving attempted monopolization requires a showing of: (1) anticompetitive or exclusion-

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§ 2, and the 1996 Act itself." *Goldwasser*, 222 F.3d at 395. None of the charges involved any allegations of anticompetitive intent; rather, the complaint merely asserted that the defendant was a monopolist, and that it had violated the 1996 Act. The Seventh Circuit observed, consistent with what we have said above, that such allegations of mere failure to fulfill obligations under the 1996 Act are insufficient to state a claim under the Sherman Act: "The fundamental fallacy in the plaintiffs' theory is that the duties the 1996 Act imposes on ILECs are coterminous with the duty of a monopolist to refrain from exclusionary practices. They are not." *Id.* at 399. The Goldwasser court further observed that there exists no independent duty to help competitors under the antitrust laws. Therefore, "[a] complaint like this one, which takes the form 'X is a monopolist; X didn't help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high' does not state a claim under Section 2." *Id.* at 400.

ary conduct; (2) with specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993). Anticompetitive conduct is "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *United States v. Griffith*, 334 U.S. 100, 107, 92 L. Ed. 1236, 68 S. Ct. 941 (1948), disapproved of on other grounds by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984). An assessment of intent is critical in determining whether an accused monopolist's actions qualify as anti-competitive conduct. 334 U.S. 100, 106-07; accord *United States v. Colgate & Co.*, 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465, 1919 Dec. Comm'r Pat. 460 (1919) (stating that "in the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal").

Covad's Sherman Act claims fall under three different categories of alleged anti-competitive behavior. First, Covad complains that BellSouth denied Covad the use of an "essential facility," namely its network of telephone lines. Although, as Covad recognizes, the anti-trust laws in general do not require that firms (including monopolies) affirmatively help their competitors to succeed, there is a narrow exception to this general rule when a monopolist improperly withholds access to an "essential facility" without which a competitor cannot enter or compete in a market. *See*, e.g., *Consolidated Gas Co. of Fla., Inc. v. City Gas Co. of Fla.*, 880 F.2d 297, 301 (11th Cir. 1989) (hereinafter, "Consolidated Gas I").[10]

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[10] Consolidated Gas I was reinstated, en banc, by 912 F.2d 1262 (11th Cir. 1990) ("Consolidated Gas II"), which was then vacated and remanded

Second, Covad complains about BellSouth's "refusal to deal." Although a party may ordinarily choose freely the companies with which it will conduct business, when a monopolist's refusal to deal is accompanied by the intent to monopolize and the requisite degree of market power, that refusal to deal may violate Section 2. *See*, e.g., *Mr. Furniture Warehouse, Inc. v. Barclays Am./Commercial, Inc.* 919 F.2d 1517, 1522 (11th Cir. 1990). Third, Covad alleges that BellSouth illegally manipulated its dual role as both Covad's wholesale supplier (of local exchange elements) and its retail competitor (for DSL) by engaging in a "price squeeze." A price squeeze is an intentional pattern of pricing wholesale inputs at such a high level that Covad cannot absorb those costs and still compete profitably in the downstream retail markets. *See*, e.g., *Cities of Anaheim, Riverside, Banning, Colton & Azusa, Cal. v. Fed. Energy Regulatory Comm'n*, 941 F.2d 1234, 1238 (D.C. Cir. 1991). Covad alleges that by assigning inordinately high costs to its wholesale offerings, and inordinately low costs to its retail offerings, BellSouth squeezes out competitors such as Covad, clearing the field for its own retail services.

It is important to recognize that each of these three theories is related to Covad's allegation that BellSouth engages in what is known as "monopoly leveraging." Monopoly leveraging occurs when a firm uses its market power in one market to gain market share in another market other than by competitive means. *See Aquatherm Indus., Inc. v. Fla. Power & Light Co.*, 145 F.3d 1258, 1262 (11th Cir. 1998) (citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) ("The use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, even if there has not been an attempt to monopolize the second market.")). For example, in this case, while BellSouth

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in 499 U.S. 915 (1991), because the parties reached a settlement and the case therefore became moot."

may not at present have a monopoly in the high-speed internet market, it can attempt to leverage its clear monopoly in the telecommunications market by refusing to deal with or provide essential facilities to competitors in the high-speed internet market. We have previously held that monopoly leveraging can violate Section 2: "When a party with monopoly power abuses its monopoly power in one market as a means of gaining an unlawful competitive advantage in and monopolizing another market, we have no hesitation to conclude that the Sherman Act prohibits such conduct." *Key Enters. of Del., Inc. v. Venice Hosp.*, 919 F.2d 1550, 1568 (11th Cir. 1990), vacated as moot by 9 F.3d 893 (11th Cir. 1993). The Supreme Court has also found that a triable question of fact exists on a Section 2 claim where a defendant used its control over one market to gain dominance in another market. *See Eastman Kodak*, 504 U.S. at 482-83; *see* also *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 431 F.2d 334, 339 (5th Cir. 1970).[11] Guided by these basic principles of antitrust law, we consider Covad's three claims sequentially.[12]

1. Essential Facilities

The withholding of access to an essential facility without which a competitor cannot enter or compete in a market is a

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[11] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

[12] We stress here that our inquiry is limited by the standard of review appropriate to BellSouth's Rule 12(b)(6) motion. Covad need only have alleged necessary elements of the relevant claims. We are not presented here with deciding, for example, whether telephone lines are in fact essential facilities for providing high-speed internet service, or whether BellSouth in fact had monopolistic intent in performing the alleged anticompetitive conduct. The standard of review at this stage is, of course, different than those at summary judgment or at trial.

violation of the antitrust laws. *See Consolidated Gas I*, 880 F.2d at 301. Under the well-established "essential facilities" doctrine, an inference of anticompetitive intent in violation of Section 2 arises upon a showing of four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *See MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983). By exercising its control over an essential facility (sometimes called a "bottleneck") to withhold access to that facility, a monopolist can exclude competition. For example, in Consolidated Gas I, we found that a massive system of natural gas pipes controlled by the defendant was an essential facility. Control over that bottleneck, the gas pipelines, enabled the defendant to exercise its power in the market to exclude competition. *See Consolidated Gas I*, 880 F.2d at 301. "Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms." *MCI*, 708 F.2d at 1132.

In *MCI*, 708 F.2d at 1133, the Seventh Circuit held that the local telephone network was an essential facility and that AT&T could not deny MCI reasonable access to it. Covad argues that MCI is essentially indistinguishable from the present case, and uses it as a template in stating the elements of its essential facilities claim. First, Covad alleges that BellSouth controls an essential facility, indeed, the same essential facility (local telephone exchange) at issue in MCI. *See id.* Second, Covad alleges that it would not be economically feasible "to duplicate Bell's local distribution facilities (involving millions of miles of cable and line to individual homes and businesses), and regulatory authorization could not be obtained for such an uneconomical duplication." *Id.* Third, Covad contends that BellSouth denied interconnections to the essential facilities, and fourth, did so even though

the interconnections could have been feasibly provided. *See id.* Finally, Covad maintains that BellSouth's conduct was intended to, and did, leverage BellSouth's local exchange monopoly into the local internet access markets to exclude Covad and to create or preserve BellSouth's monopoly power in the local internet access markets. *See id.*

BellSouth's response to this claim begins with a critique of the essential facilities doctrine itself, explaining that "essential facilities claims—along with other doctrines that Covad invokes in passing—exist at the fringes of antitrust law." Br. of Appellee at 34 (citing *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) ("The essential-facilities line[] has been criticized as having nothing to do with the purposes of antitrust law."). Whatever the merits of this critique, as the Seventh Circuit observed in Blue Cross, "we are not authorized to abrogate doctrines that have been endorsed and not yet rejected by the Supreme Court." *Blue Cross*, 65 F.3d at 1413 (citing *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986)).

With regard to the substance of Covad's essential facilities claim, BellSouth responds with three points. First, BellSouth argues that Covad cannot allege the most basic element of an essential facilities claim: the actual denial of access to an essential facility. BellSouth states that Covad conceded that BellSouth has participated in the interconnection and negotiation/arbitration process, and that Bell-South has provided all of the types of facilities that Covad has sought. According to BellSouth, the dispute is thus restricted to the following matters: the specific terms, timing, and implementation of the interconnection agreement; the alleged "delays" in obtaining collocation space and transport; and the "obstacles" in obtaining loops. BellSouth maintains that these complaints are properly characterized as claims regarding the terms or

quality of access under the interconnection agree-ment, and that none of these claims can amount to an antitrust claim.

Second, BellSouth argues that Covad's claim fails because the essential facilities doctrine never applies where a competitor seeks "preferential access" or asks the owner to "abandon its facilities." Br. of Appellee at 39 (citing *MCI*, 708 F.2d at 1133). BellSouth explains that when Covad purchases an unbundled loop, it gains exclusive use of that loop, and that antitrust laws have never required a monopolist to "cease using its own facility so that [a competitor] can begin using it." *Id.* (quoting *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1366 (9th Cir. 1992)).

Third, BellSouth argues that Covad is attempting to use antitrust law not merely to gain access to facilities, but also to force BellSouth to construct new facilities or to alter the nature of its business and become a renter of facilities for competitors to use. BellSouth observes that "no case has suggested that the monopolist must build new capacity to satisfy a would-be sharer." *Id.* at 40 (quoting 3A Areeda & Hovenkamp, Antitrust Law P 773e, at 214). BellSouth characterizes Covad's claim as an attempt to harness the antitrust law to force BellSouth to build new facilities, to develop new software, or to modify existing facilities quickly enough to meet Covad's alleged business needs.

For the most part, these are arguments that must be addressed at a later stage of the proceedings, such as summary judgment or trial. We note that with regard to BellSouth's first point, Section 2 prohibits denial of access to essential facilities on reasonable terms. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991); *City of Vernon*, 955 F.2d at 1367; *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 545 (4th Cir. 1991); accord *Del. & Hudson Ry. v. Consol. Rail Corp.*, 902 F.2d 174, 179-80 (2d Cir. 1990) ("it is sufficient if the terms of the offer to deal are unreasonable"). The "applicable legal

standard" is that "any company which controls an 'essential facility' or a 'strategic bottleneck' in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them." *United States v. AT&T*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981) (emphasis added) (citing *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 411, 56 L. Ed. 810, 32 S. Ct. 507 (1912), and *Otter Tail Power Co. v. United States*, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973), among other cases). As the Supreme Court explained in Terminal R.R., a monopolist must provide access to essential facilities "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies."[13] 224 U.S. at 411. Whether or not Covad can ultimately prove a violation, its complaint does allege that Bell South sometimes denied access to its facilities outright and other times denied access on reasonable terms.[14]

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[13] BellSouth cites to a number of cases denying essential facilities claims, but those cases are distinguishable from the present case. For example, *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996), affirming summary judgment, involved alleged over-charges under the parties' contract, not denial of access to essential facilities. *Anserphone, Inc. v. Bell Atl. Corp.*, 955 F. Supp. 418, 428-29 (W.D. Pa. 1996), found plaintiff's evidence of poor service an insufficient "constructive denial" of access to withstand summary judgment. *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 569 (2d Cir. 1990) and *Valet Apt. Servs. Inc. v. Atlanta Journal & Constitution*, 865 F. Supp. 828, 830-31 (N.D. Ga. 1994), involved fact-bound disputes about whether and where to place print advertisements.

[14] BellSouth's argument that the essential facilities claim is really an ordinary breach of contract claim does not support its motion to dismiss. Covad's allegations of anticompetitive conduct can and do "support antitrust liability" at the pleading stage. *Mr. Furniture Warehouse*, 919 F.2d at 1522-23 (monopolist's refusal to deal supports Section 2 claim

As to BellSouth's second argument, we likewise note that the case upon which BellSouth relies, *City of Vernon*, 955 F.2d at 1361, affirmed a summary judgment, not a Rule 12 dismissal. Moreover, City of Vernon sought exclusive use of a relative share of defendants' entire electrical transmission facilities. *See id.* at 1364 & nn. 3 & 4. As we understand the claim here, Covad seeks temporary use of an element of the ratepayer-funded local telephone network only for so long as Covad has a customer, after which BellSouth regains full use of the facility (which at all times remains its property). That temporary use seems quite similar to the use of a pipeline in Consolidated Gas I and is nothing more than MCI found proper. *See MCI*, 708 F.2d at 1132-33. In any case, these are primarily fact issues that reflect upon the feasibility of the requested relief. It would thus be inappropriate to grant dismissal on this basis. Similarly, whether the relief sought would unreasonably require BellSouth to construct new facilities as opposed to granting nondiscriminatory access to existing ones is primarily a question of fact inappropriate for disposition on a motion to dismiss.

Without venturing any opinion on the merits of its specific allegations, we conclude that Covad's complaint satisfies the "exceedingly low" threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim, *Quality Foods*, 711 F.2d at 995, namely, that it must adequately allege that as an integrated telecommunications company with monopoly control, BellSouth attempted to leverage its monopoly power in the high-speed internet market by giving itself preferential access to its essential facilities.

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where it is "designed to have an anticompetitive effect"). Breach of contract and antitrust are not mutually exclusive. *See City of Vernon*, 955 F.2d at 1368.

2. Refusal to deal

Covad also claims anticompetitive conduct based on Bell-South's refusal to deal with a competitor or potential competitor. Although a party may ordinarily choose the companies with whom it will conduct business, the existence of a "right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985). When a monopolist's refusal to deal is accompanied by the intent to monopolize and the requisite degree of market power, that refusal to deal may violate Section 2. *See Mr. Furniture*, 919 F.2d at 1522 (citing *National Indep. Theatre Exhibitors, Inc. v. Charter Fin. Group, Inc.* 747 F.2d 1396, 1402 (11th Cir. 1984), and *Otter Tail*, 410 U.S. *at* 377-78); accord *Lorain Journal Co. v. United States*, 342 U.S. 143, 154, 96 L. Ed. 162, 72 S. Ct. 181 (1951); *Mid-Texas Communications Sys., Inc. v. AT&T Co.*, 615 F.2d 1372, 1387 (5th Cir. 1980) (right to refuse to deal is "limited when the company possesses a monopoly because the danger exists that it may use its monopoly position to decrease competition in other markets"). As the Supreme Court has explained, "it is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal." *Eastman Kodak*, 504 U.S. at 483 n.32; accord *Aspen*, 472 U.S. at 600-05 (affirming jury's monopolization finding where monopolist ski resort ended joint marketing program with competitor).

The Seventh Circuit has summarized the Supreme Court's holding in Aspen in terms useful to our consideration of the present case:

> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* . . . goes the furthest of any case we know toward imposing (more precisely, allowing a jury to impose) a duty under antitrust law to help a competitor; and as a recent

> decision by the Supreme Court it requires our most careful and respectful consideration. The Aspen Skiing Company owned three of the four mountains that make up the Aspen skiing complex. Aspen Highlands Skiing Corporation owned the fourth. The two companies had offered their customers a joint ticket, usable on all four mountains, and the suit arose because Aspen Skiing Company terminated this cooperative arrangement. The Supreme Court found that for the convenience of customers an owner of a ski mountain in a multi-mountain skiing area normally would want to offer a ski ticket usable on any of the mountains. The joint ticket had originated at a time when there was competition among the different ski mountains at Aspen, and similar tickets were offered at other multi-mountain ski areas. 105 S. Ct. at 2858. In other words, competition required some cooperation among competitors. Aspen Highlands is not a conventional monopoly refusal-to-deal case like Otter Tail because Aspen Highlands was never a customer of Aspen Skiing Company; the skiers are the customers. But it is like the essential-facility cases in that the plaintiff could not compete with the defendant without being able to offer its customers access to the defendant's larger facilities.

Olympia, 797 F.2d at 377.

As we understand it, Covad's refusal-to-deal claim is based on alleged facts that are virtually identical to those supporting its essential facilities claim; that is, Covad simply alleges that BellSouth has refused to deal with Covad with respect to an essential facility, and that this refusal was motivated by monopolistic intent.[15] The claim is thus an amalgam of Aspen

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[15] BellSouth argues that Covad's complaint contains no specific allegation that BellSouth has forgone any economic advantage by failing to provide Covad with the accommodations it desires. Although it may be true that there is no specific allegation of this sort, the entire complaint

and Otter Tail, in that Covad is a customer of BellSouth that would like to purchase from BellSouth the right to interconnect with BellSouth's essential facility.

In response, BellSouth argues that Aspen is inapposite, because in that case the Court held that the defendant had a duty to continue to deal where termination of the relationship would involve a "sacrifice [of] short-run benefits and consumer goodwill" in the interest of excluding a rival and reducing competition. 472 U.S. at 610-11. BellSouth argues that Covad has never alleged that BellSouth has refused to deal (much less terminated a relationship); rather, Bell-South says, Covad alleged that Covad and BellSouth established a new relationship. We do not find this argument persuasive. In Aspen, which involved competitors only (not a competitor-customer relationship), defendant's termination of an existing joint-marketing relationship and accompanying sacrifice of short-term benefits supported the jury's inference of the defendant's anticompetitive intent. *See Aspen*, 472 U.S. at 610-11. However, those are not prerequisites for a refusal-to-deal claim, and Aspen does not say or suggest that they are. Other cases, such as Otter Tail, involve a refusal to deal where there has been no prior arrangement, and a vertically integrated monopolist that refuses to deal with a customer to foreclose competition in a second market may violate Section

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alleges that BellSouth's failure to live up to its contractual duties was motivated by its will to monopolize, and showing that BellSouth has forgone an economic advantage is simply a fact that, if true, would tend to support the contention of monopolistic intent in the fact of a proffered legitimate business justification. Here, on motion to dismiss, there is no proffered legitimate business justification for Covad to refute, so the absence of specific factual allegation is irrelevant. *See*, e.g., *Eastman Kodak*, 504 U.S. at 483-84 (ruling on a summary judgment motion and noting that after plaintiff's presentation of evidence of Kodak's exclusionary action with monopolistic intent, Kodak bore the initial burden of presenting evidence of "valid business reasons" to justify its actions).

2. *See Olympia*, 797 F.2d at 376-77. In other words, in Aspen, the fact that the defendant had terminated a long-standing and mutually economically beneficial agreement was significant only because it supported the jury's conclusion that the defendant's refusal to deal had been motivated by monopolistic intent rather than legitimate business purpose.

We note that in *Stein v. Pac. Bell Tel. Co.*, 173 F. Supp. 2d 975, 983 (N.D. Cal. 2001), the district court held that plaintiff had stated a valid antitrust claim on refusal-to-deal facts similar to those in the present case. In Stein, according to the plaintiff, Pacific Bell "entered into these optional and voluntary [1996 Act] agreements and then breached them or proceeded to engage in bad faith conduct in carrying them out, without any business justification and with the intent to destroy its competitors . . . so as to unlawfully maintain its monopoly." *Id.* Citing Aspen, the plaintiff claimed that such conduct violated Section 2 of the Sherman Act because Pacific Bell was "attempting to exclude rivals on some basis other than efficiency," thus making its conduct "predatory." *Id.* The Stein court held that even accepting Goldwasser in its entirety, the plaintiff had stated a valid claim. *Id.* at 983-84 ("Goldwasser did not consider whether violations of the 1996 Act, if done in a 'predatory' manner as defined in Aspen Skiing, can make up an independent basis for liability under the Sherman Act. The plaintiffs in Goldwasser did not allege, as Stein alleges here, that the defendant breached interconnection agreements in bad faith and engaged in other exclusionary practices.").

In essence, BellSouth asks this Court to conclude that it is impossible to find a refusal to deal where the defendant has formed an agreement with the plaintiff, in this case an agreement pursuant to the strictures of the 1996 Act. For the reasons stated above, we conclude that allegations that allege a failure to perform under an agreement that amount to a

refusal to deal are sufficient to state a claim under the antitrust laws.[16]

3. Price Squeeze

Covad also alleges that BellSouth manipulated its dual role as both Covad's wholesale supplier (of local exchange elements) and its retail competitor (for DSL) by engaging in a "price squeeze." BellSouth argues that Covad's allegations must fail because, as the district court stated, "there is no allegation that [BellSouth] set accompanying low retail prices for its own DSL services." BellSouth argues that in light of the 1996 Act's regulatory scheme, Covad's failure to allege accompanying low retail prices is fatal because BellSouth has no discretion over the prices it charges Covad for unbundled loops and other "inputs" that Covad uses; those charges are set by state commissions after extensive proceedings in accordance with the Act's standards. BellSouth maintains that these rates are not "merely tariffed" and BellSouth is not free to lower those rates unilaterally. Compare Br. of Amici Curiae Competitive Telecommunications Ass'n at 29 n.11. In addition, BellSouth argues that section 252 provides that all network element rates must be "based on cost," 47 U.S.C. § 252(d)(1); accordingly, Covad's failure to allege that the rates BellSouth charges for its retail DSL service are below cost forecloses Covad's claim. BellSouth argues that antitrust law cannot possibly force a company to raise above-cost retail prices to give competitors a greater margin, because such a rule would hurt, rather than help, consumers. In essence, BellSouth contends that Covad's claim boils down to a complaint that the network element rates set by state commissions are too high. BellSouth further asserts that the

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[16] Again, this case is presented to us on a motion to dismiss. BellSouth's response that it has not in fact refused to deal, while an appropriate issue for consideration on motion for summary judgment or at trial, is not open to consideration here.

appropriate remedy for this complaint is not a collateral antitrust action, but judicial review under Section 252(e)(6).

Covad responds by stating that its complaint in fact did allege that BellSouth's retail prices "are set so low related to its unbundled wholesale loop prices that Covad cannot meet BellSouth's whole-sale or retail prices and still make a reasonable return on its investment." More important, Covad maintains, this issue is irrelevant because whether or not there is a price squeeze should not depend on whether retail prices are "too low," but rather on the "squeeze" created by the disparity between the wholesale prices Covad must pay BellSouth upstream and the prices Covad must charge downstream to remain competitive with BellSouth. *See, e.g., City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1176 n.4 (8th Cir. 1982). The presence of an illegal differential, Covad states, is precisely what Covad alleged. Covad also states that commission or other regulation at the wholesale end (or even both ends) of the price squeeze is no defense.

Both sides cite a number of cases in support of these positions,[17] but BellSouth's response to the claim is essentially factual in nature, and therefore it is inappropriate to

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[17] BellSouth cites *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993) (rejecting "the notion that above-cost prices that are below . . . the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws"); *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 978-79 (6th Cir. 2000) (plaintiff "has no statutory right to compete in the economic marketplace on [its] own terms and in such a manner as to accumulate expected profits"). Compare Br. of Amici Curiae Competitve Telecomm. Ass'n at 29 n.11 (arguing that BellSouth should have raised retail prices to protect competitors).

Covad responds with *City of Kirkwood*, 671 F.2d at 1179, and *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 270, 279 (1976) ("When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves.") (citation omitted).

grant BellSouth's motion to dismiss under Rule 12. Whether or not BellSouth has any control over the wholesale prices it charges, or whether the differential between the wholesale and retail prices is such that Covad and other would-be DSL competitors are squeezed out—these are questions of fact. BellSouth may very well prevail on summary judgment, but for the purposes of the pleading stage, Covad's complaint states a claim under antitrust law.

II. Breach of Contract Claims

The district court dismissed Covad's breach of contract claims for lack of jurisdiction, finding that they must first be presented to PSCs. This Court, however, recently held that "state commissions . . . are not authorized under section 252 to interpret interconnection agreements" at all. *Bellsouth Telecomm., Inc. v. MCImetro Access Transmission Servs. Inc.*, 278 F.3d 1223, 1237 (11th Cir. 2002). BellSouth concedes that the trial court's reasoning is "inconsistent with *Bellsouth v. MCImetro*." In light of MCImetro, the trial court's dismissal for lack of jurisdiction must be reversed.

III. The 1996 Act Claim

The trial court dismissed Covad's 1996 Act claim because it found any claims "related directly to duties under the 1996 Act" must be submitted to PSCs. R3-25-38. For the same reasons that apply to Covad's breach of contract claims, this ruling is inconsistent with MCIMetro and must be reversed.

IV. State Law Claims

The trial court concluded that Covad's state tort law claims were "preempted by the 1996 Act." This holding is irreconcilable with the Act's express "No Implied Effect" clause, which set forth Congress' intent not to "modify, impair, or supercede Federal, State or local laws." Telecommunications Act of 1996, sec. 601(c)(1), § 152 note, 110 Stat. 56, 143 (1996).

BellSouth does not attempt to defend the trial court's ruling, but argues instead that Covad has failed to plead any tort claims, asserting that conduct that constitutes a breach of contract can never support an interference claim. The cases BellSouth cites, *St. Mary's Hosp. of Athens, Inc. v. Radiology Prof'l Corp.*, 205 Ga. App. 121, 421 S.E.2d 731, 735 (Ga. Ct. App. 1992), and *International Tele-comm. Exch. Corp. v. MCI Telecomms. Corp.*, 892 F. Supp. 1520, 1543 n.19 (N.D. Ga. 1995), do not support that broad proposition. Rather, they were summary judgment cases where plaintiffs had failed to produce evidence that the defendant had actually induced any third party not to contract with the plaintiff. At the Rule 12 stage, the only proper inquiry is whether Covad has alleged such direct interference. It has, in claiming that Bell-South "interfered with Covad's existing and prospective busi ness relations with customers." Therefore, the dismissal of Covad's tort claims must also be reversed.

CONCLUSION

For the reasons stated above, the decision of the district court granting BellSouth's motion to dismiss is REVERSED, and the case is REMANDED for further proceedings in light of this opinion.

APPENDIX E

UNITED STATES DISTRICT COURT FILED IN CLERKIS OFFICE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Filed July 06, 2001]

Civil Action No. 1:00-CV-3414-BBM

COVAD COMMUNICATIONS COMPANY AND DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY,
Plaintiffs,

v.

BELLSOUTH CORPORATION AND BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendants.

ORDER

This action alleging, *inter alia*, violations of the Sherman Act, is currently before the court on the defendants' motion to file excess page limitations [Doc. No. 5-11 and motion to dismiss [Doc. No. 6-11.

Factual and Procedural Background

Plaintiff Covad Communications Company ("Covad"), is a California corporation with its principal place of business in Santa Clara, California. Co-plaintiff Dieca Communications, Inc. is a Virginia corporation with its principal place of business in Santa Clara, California and is a wholly owned subsidiary of Covad.[1] Covad, founded in 1996, is in the

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[1] For convenience, the two plaintiffs will be hereinafter referred to collectively as "Covad."

business of selling high speed internet Digital Subscriber Line (IIDSLI') services. DSL transmits signals over existing copper telephone wires at least ten times faster than dial-up modems, while also leaving the line free for regular telephone use. The technology works by attaching special hardware to both the user and switch ends of a telephone line. Covad's DSL services offer consumers the advantage of paying a flat monthly fee at a low rate.

The defendants, BellSouth Corporation and BellSouth Telecommunications Corporation (hereinafter collectively "BellSouth"), are Georgia corporations with their principal places of business in Atlanta, Georgia. BellSouth is one of the Regional Bell Operating Companies that was divested from AT&T in 1983 and is permitted to provide local exchange services throughout a specified region of the country which comprises all or significant parts of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. BellSouth also offers DSL services under its own brand.

Much of this case, and the relationship between the parties, centers around the Telecommunications Act of 1996, Pub. L. 104-104,110 Stat. 56 (1996), codified at 47 U.S.C. 5 151 *et seq.* ("1996, Act"). The 1996 Act revolutionized the telecommunications industry by fostering competition to all aspects of the telecommunications market in the United States, including local telephone markets. Under the 1996 Act, as discussed below, BellSouth was required as an incumbent local exchange carrier (I'ILEC''), to perform certain duties to achieve the goal of greater competition in local telephone markets. Most of these duties concern the use and access of BellSouth's local exchange facilities to competitors who intend to enter local telephone markets. Because DSL technology depends on existing local telephone lines, Covad states that DSL competitors must have dependable,

timely and affordable access to the network that an ILEC such as BellSouth controls.

In 1998, Covad, as a prospective competitive local exchange carrier ("CLEC"), entered into an interconnection agreement with BellSouth, which provided that BellSouth would, among other things: (1) allow Covad to collocate in BellSouth central offices;[2] (2) provide interoffice transport facilities:[3] (3) provide nondiscriminatory access to operational support systems to allow Covad to place orders for facilities; and (4) obtain local loops.[4] In August 1998, pursuant to the interconnection agreement, Covad attempted to enter the BellSouth region by applying for collocation in BellSouth central offices. Covad alleges that BellSouth regularly misrepresented the availability of space in those offices so as to deny collocation altogether, and otherwise raised Covad's costs when it did permit collocation. Covad states that BellSouth also severely delayed Covad's application for collocation by months and sometimes more than a year. Moreover, even after Covad obtained collocation, Covad alleges that BellSouth systematically denied and delayed facilities essential to Covad's success, including interoffice transport, operation support systems, and local loops. Covad also states that

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[2] A "central office" houses the telephone company's switching equipment, and is the point where customer lines are connected to the network, and the network's switches are connected to each other. "Collocate" means placing equipment in central offices to provide interconnection between an ILEC's local telephone network (like BellSouth) and a competitor's network (such as Covad).

[3] "Interoffice transport facilities" means high capacity connections necessary to connect Covad's equipment in various central offices.

[4] "Local loops" are the actual copper wires used for telephone and DSL transmissions. The loops provide a user with access to the global telecommunications infrastructure that is installed all over the world. DSL uses whatever frequencies will propagate on this line for purposes of digital data transmission. These loops are also known as Unbundled Network Elements ("UNEs").

by strategically understaffing its wholesale divisions and refusing to develop electronic systems for placing orders, BellSouth thwarted Covad's aggressive first-to-market strategy, caused Covad to lose customers, and devastated Covad's ability to deliver high quality service.

Finally, Covad accuses BellSouth of several other instances of exclusionary behavior, including price squeezes, intentionally misleading advertising designed to take customers away from Covad, and using confidential customer information possessed by Covad to persuade Covad customers to change from Covad DSL services to BellSouth DSL.

On December 22, 2000, Covad filed suit against BellSouth, alleging jurisdiction under both 28 U.S.C. §§ 1331 and 1332. The complaint contains some twenty-four causes of action, including: three counts of violating the Sherman Act, twelve counts of monopolization under the laws of Alabama, Florida, Kentucky, Louisiana, North Carolina and Tennessee, seven counts of interference with business relations or unfair competition under the laws of Alabama, Florida, Georgia, Kentucky, Louisiana, North Carolina, and Tennessee, one count of violating the 1996 Act, and one count for breach of contract under Georgia law.

On February 5, 2001, BellSouth moved. to dismiss all the counts in the complaint pursuant to Fed. R. Civ. P. 12(b)(l), (3) and (6). Specifically, the defendants move to dismiss counts 1, 2, 3, 6, 7, 9, 10, 13, 14, 16, 17, 19, 20, 22, and 23 under Rule 12(b)(6) because the defendants contend that failing to perform duties under the 1996 Act are not cognizable as antitrust violations under either federal or state law. The defendants also move to dismiss counts 4 and 5 under Rule 12(b)(l) on the grounds that state public utility commissions have exclusive jurisdiction over interconnection agreements. Further, the defendants move to dismiss counts 8, 11, 12, 15, 21, and 24 under Rule 12 (b)(3) and (6) on the contention that Georgia law is the only applicable law

available for interference of business relations in this case because of a choice of law provision in the contract, and that BellSouth cannot be liable under an interference tort on the facts alleged. Finally, the defendants seek to dismiss count 18 under Rule 12(b)(6) on the grounds that Louisiana unfair trade practices law specifically exempts any activity subject to the state public service commission. On June 26, 2001, the court heard oral arguments on the motion to dismiss and advised the parties that a written order would follow.

Motion to Dismiss

BellSouth has moved to dismiss on the grounds of failure to state a claim, lack of subject matter jurisdiction and improper venue. The court first discusses the applicable standards of review.

I. Standards of Review

A. Rule 12(b)(6)

A complaint should be dismissed under Rule 12(b)(6) only where it appears beyond doubt that no set of facts could support the plaintiff's claims for relief. Fed. R. Civ. P. 12(b)(6); *Conley v. Gibson*, 355 US. 41/47 (1957); *Linder v. Portocarrero*, 963 F.2d 332,334 (11th Cir. 1992). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the, plaintiff. *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983). Notice pleading is all that is required for a valid complaint. *Lombard's, Inc. v. Prince Mfn., Inc.*, 753 F.2d 974,975 (11th Cir. 1985). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *Id.*

To establish a prima facie case for claims under antitrust law, "enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified.

Conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief." *Quality Foods*, 711 F.2d at 995. "However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent." *Id.* (citations omitted). "Thus, to avoid defendants' motion to dismiss plaintiffs must have pleaded enough data so that each element of the alleged antitrust violations can be properly identified, and which data, if accepted as true, satisfy these elements." *Valet Apartment Servs., Inc. v. Atlanta Journal and Constitution*, 865 F. Supp. 828,831 (N.D. Ga. 1994), *aff'd mem.*, 50 F.3d 1039 (11th Cir. 1995).

B. Rule 12(b)(l)

"If a district court lacks subject matter jurisdiction over a claim, that claim cannot provide a basis for imposing liability, and it necessarily follows that the claim states no violation of federal law." *Wascura v. Carver*, 169 F.3d 683,685 (11th Cir. 1999). "[P]arties cannot waive subject matter jurisdiction, and [the court] may consider subject matter jurisdiction at any time during [the] litigation." *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999), cert. denied, 529 U.S. 1003 (2000). "Attacks on subject matter jurisdiction come in two forms: (1) facial attacks, and (2) factual attacks." *Id.* (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)).

Facial attacks on a complaint "require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in [plaintiff's] complaint are taken as true for the purposes of the motion." Lawrence, 919 F.2d at 1529. Factual attacks challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.* In a factual attack, the presumption of truthfulness afforded a plaintiff under Fed. R. Civ. P. 12(b)(6) does not attach, and the court

is free to weigh the evidence. *See id.*; *see also Scarfo*, 175 F.3d at 960-61. However, "[w]hen the jurisdictional basis of a claim is intertwined with the merits, the district court should apply a Rule 56 summary judgment standard when ruling on a motion to dismiss which asserts a factual attack on subject matter jurisdiction." *Lawrence*, 919 F.2d at 1530. In this case, because the defendants have made a facial attack upon the complaint and have not attempted to present any factual evidence from outside the complaint to the court, the motion to dismiss will be reviewed under the same standards as a Rule 12(b)(6) motion.

C. Rule 12(b)(3)

"[M]otions to dismiss upon the basis of choice-of-forum and choice-of-law clauses are properly brought pursuant to Fed. R. Civ. P. 12(b)(3) as motions to dismiss for improper venue." *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998), cert. denied, 595 U.S. 1093 (1999). For defenses raised under Rule 12(b)(3), the court may consider matters outside the pleadings if presented in proper form by the parties. *See, eg.*, 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1364 (2d ed. 1990). In a case such as this, where the parties have not presented additional material to the court, the motion is analyzed under the same standards as a motion to dismiss under Rule 12(b)(6).

II. Claims under the Sherman Act

The plaintiffs have brought three counts under Section 2 of the Sherman Act, Count 1: essential facilities doctrine, Count 2: monopolization and Count 3: attempted monopolization. Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

"Section 2 thus proscribes three offenses: monopolization (or "actual" monopolization), attempted monopolization, and conspiracy to monopolize. Only the first two offenses are at issue in this case.[5]

The offense of monopolization has two elements: "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *United States v. Microsoft*, No. 00-5212 consolidated with 00-5213, 2001 U.S. App. LEXIS 14324, at "20 (D.C. Cir. June 28, 2001) (per curiam) (quoting *United States v. Grinnell Corn*, 384 U.S. 563,570-71 (1966)).[6] "To establish a [Section] 2 violation for attempted monopolization, 'a

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[5] Although Covad pleads denial of "essential facilities" as a separate count in the complaint, this activity is actually a form of exclusionary conduct that falls within monopolization.

[6] The District of Columbia Circuit in the *Microsoft* case recently noted the definition of "monopoly power":

> While merely possessing monopoly power is not itself an antitrust violation, it is a necessary element of a monopolization charge. The Supreme Court defines monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377,391 (1956). More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear. Because such direct proof is only rarely available, Courts more typically examine market structure in search of circumstantial evidence of monopoly power. Under this structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers. "Entry barriers" are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level.

Microsoft, 2001 U.S. App. LEXIS 14324, at *21-23 (citations omitted).

plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'"[7] Microsoft, 2001 U.S. App. LEXIS 14324, at "111 (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 US. 447,456 (1993)); *Retina Assocs., P.A. v. Southern Baptist Hosp. of Fla., Inc.*, 105 F.3d 1376,1384 (11th Cir. 1997).

Through these counts, Covad alleges essentially five theories of exclusionary or anticompetitive conduct: (1) refusal to deal; (2) denial of essential facilities; (3) predatory price squeezes; (4) predatory advertising and promotion; and (5) monopoly leveraging. These theories contain their own definitions and elements. However, because Covad's allegations surrounding BellSouth's refusal to deal concern only a denial of essential facilities, these two theories will be considered together. Before turning to these categories of exclusionary conduct, the court first considers BellSouth's arguments surrounding the preclusive effect of the 1996 Act on antitrust claims.

A. The 1996 Act and the Effect of Goldwasser

As noted above, the 1996 Act represents a comprehensive effort by Congress to bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets. The Act was designed to "promote competition and reduce regulation in order to secure lower prices and higher quality

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[7] Covad has sufficiently pled the specific intent requirement for attempted monopolization. In later discussing the different categories of exclusionary conduct, the alleged conduct will also apply for attempted monopolization, except for the conduct of monopoly leveraging. The court will not further discuss the specific intent required of attempted monopolization, or consider attempted monopolization in a separate section.

services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Preamble to Telecommunications Act of 1996.

Two sections of the 1996 Act are of central importance in this case: 47 U.S.C. §§ 251 and 252. The sections are both contained in Part I1 of the statute, which is entitled "Development of Competitive Markets." Section 251 sets out detailed rules that implement the general duty of telecommunications carriers (as established in the statute) to interconnect with one another's facilities and equipment. Each local exchange carrier ("LEC"), has the duty (1) to resell on reasonable and nondiscriminatory terms; (2) to provide number portability to the extent technically feasible; (3) to provide dialing parity to competing providers; (4) to afford access to rights-of-way; and (5) to establish reciprocal compensation arrangements for the transport and termination of telecommunications. *See id.* § 251(b).

Incumbent LECs, or ILECs, have additional duties under the statute, which are spelled out in section 251(c). ILECs are required to: (1) negotiate in good faith to create the agreements necessary for fulfilling the subpart (b) duties; (2) provide for "requesting telecommunications carriers" appropriate interconnections; (3) provide unbundled access to network elements at any technically feasible point on just, reasonable and nondiscriminatory terms; (4) offer to aspiring competitors at wholesale rates any services that they sell at retail; and (5) give reasonable public notice of changes in their services that would affect others. *See id.* § 251(c).

ILECs and competitive local exchange carriers, or CLECs, must attempt to negotiate the terms of interconnection and resale. *See id.* §§ 251(c)(l) and 252(a). If the parties cannot reach an agreement, any party may request arbitration, and the parties are required to participate. *See id.* § 252(b)(1) and (5). All interconnection agreements adopted by negotiation or arbitration must be submitted for approval to the respective

state public service commission (''PSCI'). *See id.* § 252(e). Parties may appeal any state PSC decision under the 1996 Act to federal district court. *See id.* § 252(e)(6).

The 1996 Act also contains specific language about its relation to the federal antitrust laws. Section 601(b)(l), found at 47 U.S.C.A. § 152 Historical and Statutory Notes, provides that ". . . nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." To similar effect, section 601(c)(l) states that "this Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments ."

Before July 2000, few district courts addressed the issue of the applicability of antitrust law on ILECs' duties under the 1996 Act, *see*, ex., *Covad Communications Co. v. Pacific Bell Co.*, No. C 98-1887 SI (N.D. Cal. Dec. 14, 1999) (denying ILEC's motion to dismiss claims under the Sherman Act), and no circuit court of appeals had spoken on the issue. However, almost one year ago, the Seventh Circuit in the case of *Goldwasser v. Ameritech Corporation*, 222 F.3d 390 (7th Cir. 2000) addressed the matter and found in favor of an ILEC alleged to have violated the Sherman Act by failing to perform duties under the 1996 Act.

Goldwasser involved a class of consumers of local telephone service suing Ameritech, which like BellSouth, was an ILEC and subject to extended duties to deal with competitors as detailed in section 251(c) of the 1996 Act. The plaintiffs alleged that Ameritech controlled more than 90% of the markets for local telephone service and controlled "essential facilities" that competitors could not duplicate. The plaintiffs also alleged that by "erect[ing] substantial barriers" and "engaging in a host of exclusionary practices made possible by its monopoly power," Ameritech was preventing competitors from entering the market. The plaintiffs listed

twenty specific instances of allegedly exclusionary conduct by Ameritech. The plaintiffs alleged that Ameritech had violated both Section 2 of the Sherman Act and sections 206 and 207 of the 1996 Act.

The court noted that the plaintiffs' complaint "focuses tightly on the ILEC's section 251 duties" and all instances of illegal conduct alleged by the plaintiffs were violations of duties arising under the 1996 Act. *Id.* at 394,399-400. The court also found that although the 1996 Act contains an anti-trust savings clause, the "elaborate enforcement structure'' of the 1996 Act precludes suits under the Sherman Act for ILEC duties because "antitrust laws would add nothing to the over-sight already available under the 1996 law."[8]

Id. at 400-01. The court ultimately held that the 1996 Act "imposes duties on ILECs that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws either, they are simply more specific and far-reaching obligations that Congress believed would accelerate the development of competitive markets."[9] *Id.* at 401. Finally,

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[8] The court noted

> . . . Congress could have chosen a simple antitrust solution to the problem of restricted competition in local telephone markets. It did not. Instead, in an effort to jump-start the development of competitive local markets, it imposed a host of special duties on the ILECs; it entrusted supervision of those duties to the FCC and the state public utility commissions; and it created a system of negotiated agreements through which this would be accomplished. These are precisely the kinds of affirmative duties to help one'scompetitors that we have already noted do not exist under the unadorned antitrust laws.

Goldwasser, 222 F.3d at 399-400.

[9] The court explained

> It is not our task to assess the wisdom of the particular measures Congress thought would be helpful in [the 1996 Act] process. We have only to recognize that the duties to which plaintiffs refer in

the court examined if the plaintiffs had alleged any facts that could "be divorced from its 1996 Act context such that it states a freestanding antitrust claim for Rule 12(b)(6) purposes." *Id.* at 401. Finding no allegations of a freestanding antitrust claim, the court affirmed the dismissal of the counts under the Sherman Act for failure to state a claim. The court stated:

> It is true that paragraph 37 of the complaint asserts that Ameritech "dominates and controls an essential facility, which consists of its telephone lines, equipment, and transmission' and interconnection stations in the relevant market," and paragraph 38 asserts that Ameritech's competitors are practically and reasonably unable

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paragraphs (1) through (20) of their complaint, which we have set out earlier, go well beyond anything the antitrust laws would mandate on their own. A complaint like this one, which takes the form "X is a monopolist; X didn't help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high" does not state a claim under Section 2. The reason is because the antitrust laws do not impose that kind of affirmative duty, even on monopolists.

To the extent such a duty exists, as the complaint itself makes clear, it comes from the 1996 Act. We think it both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws. It is illogical because there are countless laws that a firm with market power might violate that have little or nothing to do with its position in the market: an agricultural firm might fail to comply with safety or cleanliness standards applicable to food processing; a computer processor firm might violate employment discrimination laws; a pharmaceutical firm might run afoul of the Food and Drug Administration's rules for approval of new drugs. Even if, in some indirect way, those defalcations helped the firm to maintain its monopoly, the link is too indirect to support an antitrust claim. Those other statutory regimes contain their own penalty structures, and that is the proper way to address any violations.

Goldwasser, 222 F.3d at 400.

> to duplicate those essential facilities. The complaint also alleges that Ameritech has refused to deal with its competitors on just, reasonable, and nondiscriminatory terms. Nevertheless, when one reads the complaint as a whole these allegations appear to be inextricably linked to the claims under the 1996 Act. Even if they were not, such a conclusion would then force us to confront the question whether the procedures established under the 1996 Act for achieving competitive markets are compatible with the procedures that would be used to accomplish the same result under the antitrust laws. In our view, they are not. The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes under the sec. 252 agreements. The 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.

Id. at 401.

In the wake of *Goldwasser*, several district courts, including district courts in the Eleventh Circuit, have addressed similar suits and applied the facts and interpretations of *Goldwasser* with varying results.[10] For example, the

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[10] *See, e.g.,Building Communications v. Ameritech Servs., Inc.*, No. 97-CV-76336 (E.D. Mich. June 21,1999); *Supra Telecomm. & Info. Sys., Inc. v. BellSouth Telecomm., Inc.*, No. 99-1706-CN (S.D. Fla. June 8, 2001) (Seitz, J.) (hereinafter *Supra*); *MGC Communications, Inc. v. BellSouth Telecomm., Inc.*, No. 00-2808-CN (S.D. Fla. May17,2001) (Gold, J.) (hereinafter *MGC*); *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, No. 00 Civ. 1910, 2000 WL 1800653 (S.D.N.Y. April 26,2001) (hereinafter *Trinko*); *Stein v. Pacific Bell Co.*, No. C 00-2915 SI (N.D. Cal. Feb. 14, 2001); *Intermedia Communications, Inc. v. BellSouth Telecomm., Inc.*, No. 8:OO-Civ-141O-T-24 (M.D. Fla. Dec, 15,2000)

two Southern District of Florida cases of *Supra* and *MGC* considered claims and facts alleged similar to those in *Goldwasser* and dismissed federal and state antitrust claims on the grounds noted in *Goldwasser*. In those cases, the plaintiffs alleged that the defendant (which was BellSouth in both actions) engaged in exclusionary conduct by denying the plaintiffs, among other things: (1) reasonable access to essential databases and operations support systems; (2) reasonable access to UNE combos; (3) parity with respect to access and portability of telephone numbers; and (4) other essential facilities necessary to provide telecommunications systems. The courts found that the alleged exclusionary activities all fell within the duties noted in the 1996 Act, and relying on *Goldwasser*, dismissed all federal and state antitrust claims. The district courts in *Intermedia* and *Trinko* also reached similar results and dismissed claims arising under the Sherman Act. The decision in *Intermedia*, a Middle District of Florida case, is currently on appeal to the Eleventh Circuit.

In contrast to *Supra*, *MGC*, *Intermedia* and *Trinko*, the courts in *Stein*, *Electronet* and *Sprint* reached different results. In *Stein*, the court, as in *Goldwasser*, dismissed the plaintiffs' Sherman Act claims for denying essential facilities. The court also dismissed antitrust claims for monopoly leveraging. However, the court denied the motion to dismiss claims of attempted monopolization through breaching the interconnection agreement. The court noted that the *Goldwasser* court did not consider "whether violations of the 1996 Act, if done in a 'predatory' manner . . . can make up an independent basis for liability under the Sherman Act. The

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(Bucklew, J.) (appeal filed) (hereinafter Intermedia); *MGC Communications, Inc. v. Sprint Corp.*, No. CV-SO0-0948-PMP (D. Nev. Dec. 12, 2000) (hereinafter *Sprint*); *Electronet Intermedia Consulting, Inc. v. Sprint-Fla., Inc.*, No. 4:00-CV-0176-RH (N.D. Fla. Sept. 20, 2000) (Hinkle, J.) (hereinafter *Electronet*).

plaintiffs in *Goldwasser* did not allege, as [the plaintiffs] allege here, that the defendant breached interconnection agreements in bad faith and engaged in other exclusionary practices." *Stein*, No. C 00-2915 SI p.10. Thus, the court concluded that the plaintiffs "alleged the type of conduct that exceeds a monopolist's right to deal or not to deal with competitors, in violation of Section 2 of the Sherman Act." *Id.*

In *Electronet* and *Sprint*, the courts denied the defendant ILECs' motions to dismiss, but provided little written analysis or reasons why the motions were denied. In *Electronet*, a Northern District of Florida case, the court provided analysis in granting a motion to dismiss for claims arising under sections 251 and 252 of the 1996 Act itself. However, the court only briefly noted claims under the Sherman Act by stating "these are all theories under which *Electronet* could recover on an appropriate factual showing." A footnote in the order also referred to *Goldwasser*: "It is true, as [the defendant] notes, that a violation of the [1996 Act], without more, does not an antitrust violation make. In the case at bar, however, unlike in *Goldwasser*, there are allegations of misconduct separate and apart from any alleged violations of the [1996 Act]." *Electronet*, No. 4:00cv0176-RH p. 2, n. 1. Similarly, the court in Sprint summarily denied the motions to dismiss antitrust claims and provided no written analysis or reasons why the motion was denied.

The court now turns to Covad's antitrust claims and allegations of exclusionary conduct.

B. Alleged Exclusionary Conduct

Covad presents essentially ten categories of BellSouth's alleged exclusionary conduct in violation of Section 2 of the Sherman Act: (1) continually delaying and obstructing Covad's attempts at physical collocation despite its

availability, Complaint ¶¶ 47-64;[11] (2) delaying of provisioning of interoffice transport and customer circuits, *id.* ¶¶ 77 65-66; (3) delaying the processing of Covad customer orders by maintaining an operational support system that is slow and inefficient, *id.* ¶¶ 67-71; (4) engaging in exclusionary loop practices by impeding Covad from getting loops to its user's premises, *id.* ¶¶ 72-83; (5) engaging in exclusionary line sharing practices, *id.* ¶¶ 84-90; (6) engaging in a price squeeze by driving the price of wholesale inputs high from BellSouth's position as both Covad's supplier and a retail competitor of DSL services, *id.* at ¶¶ 91-95; (7) engaging in suppression of output by failing to offer DSL services until forced to do so through competition, *id.* ¶ 15; (8) strategically understaffing wholesale divisions to delay the processing of Covad customer orders, *id.* ¶ 96; (9) engaging in misleading advertising by promoting a nonexistent product, *id.* ¶¶ 97-98;[12] (10) misappropriation of confidential customer

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[11] The court notes that these listed allegations are merely categories of complaints which contain several specific practices of BellSouth which Covad states is exclusionary conduct. For example, for the first allegation, Covad alleges BellSouth delayed or obstructed collocation by: imposing delays in finding space, Complaint ¶¶ 47-49; creating a cumbersome request process, *id.* ¶ 50; slowing the speed of price quotes, *id.* ¶¶ 51-53; slowing the speed of collocation provisioning, *id.* ¶¶ 54-57; mandating virtual rather than physical collocation, *id.* ¶ 58; mandating caged rather than cageless collocation, *id.* ¶ 59; and creating obstacles to installation and access, *id.* ¶¶ 60-64. For brevity, the court has consolidated many of these allegations.

[12] The allegations of misleading advertising include the following:

> . . . BellSouth has engaged in activities designed to mask its own inability to deliver timely service, so as to prevent Covad from gaining any significant market share as a first-to-market competitor with BellSouth in the DSL market. One such activity is BellSouth's knowingly false, misleading and fraudulent marketing campaign for its DSL FastAccess product. For example, BellSouth advertises on its website that it will use its best efforts to install DSL within 10 to 14 business days from the date of customers' order. *See*

information, *id.* ¶¶ 99-101; and (11) engaging in a pattern of anticompetitive conduct generally designed to leverage BellSouth's monopoly power in local networks into enhanced market power in DSL markets, *id.* ¶ 45. These allegations will be organized according to their respective theories of exclusionary conduct.

1. Refusal to Deal/Essential Facilities

The first five allegations (listed above) of exclusionary conduct fall under the doctrine of essential facilities which is a type of a refusal to deal. "A unilateral refusal to deal is [generally] not unlawful. Under certain circumstances, however, even a unilateral refusal to deal may constitute a violation of [Section] 2." *Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc.*, 919 F.2d 1517, 1522 (11th Cir. 1990). "The proscription on monopolization and attempts to monopolize may embrace a unilateral refusal to deal when accompanied by the intent to monopolize and the requisite degree of market power." *Id.* (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366,377-78 (1973)). A monopolist's refusal to deal thus becomes actionable under the antitrust laws "only where the refusal is designed to have an anticompetitive effect, whether to gain greater market share, to drive up prices, or to obtain some other illegal goal."

> https://fastl.corp.bellsouth.net/adsl/faq.jsp#installation3 ("How soon can I get DSL installed? We make every effort to ship self-install kits for receipt within 10-12 business days of order placement. For technician installations, we make every effort to schedule an installer within 10-14 business days of your order."). . . . Bellsouth makes these promises despite its clear lack of resources devoted to provisioning DSL services. BellSouth's representation that it can process DSL orders within ten to fourteen business days is patently false, and seeks to occupy the market with a product that cannot be delivered.
>
> Complaint ¶¶ 97-98.

Id. at 1522 (citing *Mid-Texas Communications Svs., Inc. v. AT&T*, 615 F.2d 2372, 1385-86 (5th Cir. 1980)).

A form of a refusal to deal in which someone is denied access to a particular facility has become known as the "essential facilities" doctrine. The essential facilities doctrine imposes liability on a Section 2 defendant when the plaintiff proves the following elements: (1) control of an essential facility by a monopolist; (2) a competitor's inability reasonably or practically to duplicate the essential facility; (3) denial of the use of the facility to the competitor; and (4) providing the competitor access to the facility is feasible. *See MCI Communications Corn v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *Valet Apartment*, 865 F. Supp. at 833.

In this case, as, noted above, Covad's first five allegations concerning: (1) denial of physical collocation; (2) delaying interoffice transport and customer circuits; (3) engaging in exclusionary loop practices; and (4) delaying the processing of customer orders by maintaining an operational support system that is slow and inefficient; and (5) engaging in exclusionary line sharing practices, all fall under the essential facilities doctrine. Further, BellSouth contends, and Covad admits, that these allegations arise from BellSouth's duties under the 1996 Act and Covad's interconnection agreement with BellSouth. BellSouth argues that because these allegations relate to its duties under the 1996 Act, antitrust claims arising from these allegations must be dismissed as in *Goldwasser*.

Covad responds to BellSouth's contentions by emphasizing the liberal standard of a Rule 12(b)(6) motion and the broad language of the elements for pleading Section 2 claims. Covad also disagrees with the Goldwasser court and contends that the antitrust savings clause in the 1996 Act and the 1996 Act's legislative history clearly indicate that Section 2 suits may be brought when an ILEC fails to perform its duties

under the Act.[13] Covad also points to the brief filed by the FCC and the Department of Justice on behalf of a CLEC in the *Intermedia* case, which is currently on appeal to the Eleventh Circuit. Covad argues that because the FCC

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[13] Covad further notes that several members of Congress and even the Attorney General of the United States believe that *Goldwasser* was wrongly decided and that aggrieved CLECs can bring antitrust suits against ILECs for failure to perform duties under the 1996 Act. For example, during a hearing on the Department of Justice before the House Judiciary Committee, the following dialogue ensued between House Member Chris Cannon and Attorney General John Ashcroft:

> CANNON: [O]ne of the issues that has been poignant has been the scope of the antitrust effort as to broadband. In March of this year, the Justice Department, together with the Federal Communications Commission, filed a joint *amicus curiae* brief in the 11th Circuit in the case of *Intermedia Communications v. BellSouth*. The amicus brief was a joint DOJ and FCC commentary on the court's holding in an earlier case in the 7th Circuit, which was *Goldwasser v. Ameritech*. The Justice Department's amicus brief argued that *Goldwasser* and its progeny are clearly in error. . . .
>
> For the benefit of the members of this committee, would you please summarize your department's position on the *Goldwasser* decision and the way that decision has been interpreted by the regional Bell operating companies in subsequent litigation?
>
> ASHCROFT Thank you very much. In asking the question, I think you've defined the position of the department relatively clearly. I would just reiterate the fact that in the enactment of the 1996 telecommunications reform measures, the Congress expressed its will and intent with very substantial clarity with a savings clause indicating that the antitrust prerogatives that inure to the enforcement authorities would remain in place.
>
> When courts of appeals indicated that this was—or at least wrote an opinion which was interpreted to say this was no longer the case—we felt it very important that the department again reiterate what the Congress had explicitly, in our judgment, made clear in the 1996 act. And that remains the position of the Department of Justice.

Hearing; on the Justice Department Before the House Comm. on the Judiciary, (June 2, 2001), 2001 WL 615726.

disagrees with the *Goldwasser* court, this court should interpret the 1996 Act as not precluding suits under the Sherman Act premised on duties under the 1996 Act.

After considering these arguments, the court agrees with the *Goldwasser* court. Allegations one through five clearly represent affirmative duties which are above and beyond the requirements of the Sherman Act. Almost every district court since the opinion in *Goldwasser* has dismissed antitrust claims which allege exclusionary conduct arising from the failure to perform duties under the 1996 Act, especially allegations styled under an essential facilities theory. Moreover, those courts that did not dismiss Section 2 claims provided little or no reasons why the motion to dismiss was denied. The court recognizes that the FCC, the Department of Justice, and certain members of Congress have favored a broader scope of Section 2 violations that should be available for failing to perform duties under the 1996 Act. These facts are instructive but not persuasive. If Congress and the FCC desire to amend the 1996 Act and accompanying regulations to specifically include antitrust remedies for failing to perform affirmative duties, then they may do so. In the meantime, this court's role is to apply the current, correct and logical interpretation of the 1996 Act and the Sherman Act. Accordingly, the first five allegations of exclusionary conduct under the Sherman Act cannot stand, and fall to state a claim on which relief can be granted.

The court also finds that allegations six and eight fail to state a claim under Section 2 of the Sherman Act. Allegation eight, which alleges that BellSouth engaged in a pattern of intentionally "understaffing" wholesale divisions and delayed the processing of customer orders, is simply another complaint of a refusal to deal or a denial of essential facilities stemming from BellSouth's failure to live up to its 1996 Act duties. Hence, this allegation is "inextricably linked" with BellSouth's duties under the 1996 Act, as noted in *Gold-*

wasser. Allegation seven also fails to state a claim under Section 2, even disregarding the holding of *Goldwasser*. Simply because BellSouth chose not to provide DSL services until CLECs began to offer such services does not amount to exclusionary conduct which affected Covad. Indeed, Covad did not even exist until shortly after the 1996 Act was enacted. In sum, BellSouth's motion is GRANTED for claims under the Sherman Act which rely on allegations (1) - (5) and (7)-(8) and are hereby DISMISSED under Rule 12(b)(6).

2. Predatory Price Squeeze

Covad alleges that BellSouth engaged in an unlawful price squeeze by "impos[ing] upon Covad a two-pronged pricing structure that makes it uneconomical for Covad to compete with BellSouth." Complaint ¶ 91. Covad alleges the pricing structure sets a high wholesale price for DSL loops sold to CLECs while at the same time setting a low retail price for its retail DSL service, thus making Covad's DSL service unprofitable. *See id.* ¶ 92.

A price squeeze has been defined as "occurring when a vertically integrated company sets its prices or rates at the first (or "upstream") level so high that its customers cannot compete with it in the second-level (or "downstream") market." Von Kalinowski, Sullivan & McGuirl, Antitrust Laws And Trade Regulation (2d ed. 1996) § 27.04; *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.). There are three prerequisites for an actionable price squeeze: (1) the defendant must operate at two levels of an industry, and its competitors at one level must also be its customers; (2) the defendant's rates or prices at the second level must be "too low" relative to the prices charged to competitors at the first level, so the customer/competitor is "squeezed" and cannot compete at the second level; and (3) to establish a Section 2 claim, the defendant must have monopoly power at the first level and must use the price squeeze to monopolize or attempt to monopolize the

second level. *See City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1376-77 (9th Cir. 1992); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17/18 (1st Cir. 1990) (Breyer, J.).

Courts have analyzed price squeezes differently when the defendant is an entity in a highly regulated industry. In *Town of Concord*, the First Circuit held that the existence of effective price regulation at both the first and second industry levels "makes it unlikely that requesting such rates will ordinarily create a serious risk of significant anticompetitive harm. . . . [T]herefore, [] price regulation will, in most cases, prevent a price squeeze from constituting an exclusionary practice of the sort that Sherman Act [section] 2 forbids." *Town of Concord*, 915 F.2d at 19. In contrast to City of Concord, the court in City of Anaheim (and other circuits) found that a regulated industry could be protected from Section 2 liability if the alleged price squeeze was not accompanied by a specific intent to monopolize. *See City of Anaheim*, 955 F.2d at , 1378-79.

In this case, the court finds that Covad's price squeeze allegations fail for the same reasons that its essential facilities allegations fail. Covad is able to purchase wholesale DSL loops from BellSouth because the 1996 Act mandates that BellSouth provide them at a set, nondiscriminatory price. *Goldwasser* considered a similar allegation, which stated: "Ameritech has refused to sell to its competitors local telephone services at wholesale prices that are just, reasonable, and nondiscriminatory, which prevents the competitors in turn from offering attractive resale prices to consumers." *Goldwasser*, 222 F.3d at 395. Although this is not an allegation of a true price squeeze in that there is no allegation that the ILEC set accompanying low retail prices for its own DSL services, the price squeeze allegation in this case clearly reflects duties under the 1996 Act, the Interconnection

Agreement, and the prices set by PSCs.[14] Thus, the court finds that Covad's price squeeze allegations are intertwined with 1996 Act duties, and hereby DISMISSES allegation six for failure to state a claim.

3. Predatory Advertising and Promotion

Covad contends, as noted in allegations nine and ten, that BellSouth engaged in predatory advertising and promotion by making misleading statements about their "FastAccess" DSL service and by misappropriating Covad's customer lists.

The court is unaware of any Eleventh Circuit case dealing with false advertising or misappropriation of customer lists as exclusionary conduct, and as commentators have recognized: "Predation effected through promotion or advertising has been characterized as an area of law that is unclear at best." VON KALINOWSKI ON ANTITRUST § 27.04[3]. However, a few circuits have addressed this topic and found that certain types of advertising and promotional activities can constitute exclusionary conduct. *See, eg., National Ass'n of Pharm. Mfrs., Inc. v. Averst Labs.*, 850 F.2d 904 (2d Cir.

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[14] For example, Covad's allegations of an artificially high wholesale loops costs include:

> First, BellSouth did not offer line sharing to Covad at all until June 2000. As a result, for most of the relevant period, Covad has been entirely unable to obtain the costing benefits of line sharing. Covad was left, instead, to purchase the much more expensive and unnecessary stand-alone loops, or be unable to offer any competition at all. Second, since June 2000, line sharing has been available to Covad only on a very limited basis, and BellSouth has failed to develop processes to provision it in a timely and dependable manner. Thus, while BellSouth has installed approximately 140,000 line-shared DSL lines for its own retail customers, it has installed fewer than 400 line-shared lines for Covad, despite Covad's placement of thousands of orders. . . .

Complaint ¶ 95. As shown above, these activities are related to BellSouth's duties under the 1996 Act.

1988) (holding that the plaintiff should be allowed to go forward with discovery to substantiate claim that predatory advertisement was false, although the plaintiff must overcome a presumption that the effect on competition is *de minimis*);[15] *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95,100 (5th Cir. 1988) (noting that advertising which "creates barriers to entry in market constitutes predatory behavior of the type antitrust laws are designed to prevent"); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 927 (9thCir. 1980) (finding that appropriation of slogans and symbols, among other activities, "could have made [the plaintiff's] entry into the market more difficult and costly, to the detriment of competition generally"); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980) (holding that it is unlawful for a monopolist to use false advertising for purposes of preventing competition).

Here, the court finds that the allegations of misleading advertising could constitute unlawful exclusionary conduct. The court in *Goldwasser* did not consider false advertising as exclusionary conduct, and this court finds that these allegations could be considered "freestanding antitrust claims" outside the coverage of the 1996 Act. Although the effect of the advertising may have had a minimal effect on competition, the court cannot decide on a Rule 12(b)(6) motion if these allegations are meritless. Therefore, BellSouth's motion to dismiss is DENIED for allegations in category nine.

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[15] The court in *Ayerst Labs* noted Professors Areeda's and Turner's formula to determine if false advertising may ,overcome a *de minimis* presumption. The plaintiff must show "'by cumulative proof that the representations were [l] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals.'" *Averst Labs*, 850 F.2d at 916 (quoting 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 738a, at 279).

However, the allegations surrounding misappropriation of confidential customer information may not survive a motion to dismiss because they are included under the 1996 Act. Section 222(b) states: "A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purposes, and shall not use such information for its own marketing efforts." This duty is also covered by paragraph 9 of the Interconnection Agreement between BellSouth and Covad. Therefore, the misappropriation of customer information cannot be considered a freestanding claim and BellSouth's motion is GRANTED for allegations in category ten and are hereby DISMISSED.

4. Monopoly Leveraging

Finally, Covad also contends that BellSouth engaged in monopoly leveraging by using its monopoly power in the local telephone service industry to gain advantage in the DSL market. Monopoly leveraging involves the use of monopoly power in one market to gain an advantage in another market. *See Eastman Kodak*, 504 US. at 483; *United States v. Griffith*, 334 U.S. 100 (1948). To establish illegal leveraging of monopoly power the challenged conduct must "threaten[ ] the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share." 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (1996) 5 652c, at 90. When leveraging results in monopoly power or comes perilously close to achieving such power in the second market, there is no doubt that leveraging violates Section 2. *See Griffith*, 334 U.S. at 108. However, the circuits are split on whether a Section 2 violation can be made when leveraging provides only an advantage in the second market that falls short of the market power necessary to find attempted monopolization, or that monopoly leveraging even

exists as a separate theory of exclusionary conduct. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979) (need not show attempted monopolization in second market); *see also M&M Med. Supplies and Sew., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168-69 (4th Cir. 1992) (en banc) (declining to determine whether there exists a claim for monopoly leveraging that differs materially from the classic claim for monopolization); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171,204-06 (3d Cir. 1992) (rejecting monopoly leveraging); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 n. 16 (9th Cir. 1991) (rejecting monopoly leveraging).[16] The Eleventh Circuit has indicated that it would follow Berkey Photo, although the court has harbored "some reservation about the conclusion that no attempt to monopolize the leveraged market need be proved." *See Key Enters. of Del., Inc. v. Venice Hosp.*, 919 F.2d 1550,1567 (11th Cir. 1990), vacated as moot, 9 F.3d 893 (11th Cir. 1993); *see also Aquatherm Indus., Inc., v. Florida Power & Light Co.*, 145 F.3d 1258,1262 (11th Cir. 1998) (declining to "extend Berkey Photo to a situation in which a monopolist projects its power into a market it not only does not seek to monopolize, but in which it does not even seek to compete.").

In this case, the court finds that Covad may state a claim for monopoly leveraging through exclusionary conduct not implicated by the 1996 Act. Covad has not stated in its allegation of monopoly leveraging that BellSouth has monopolized or attempted to monopolize the DSL market and only noted that BellSouth would receive "enhanced market power" in the DSL market. However, the Eleventh Circuit (although expressing reservations) has not expressly rejected monopoly leveraging as an independent theory or the lack of

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[16] The district court in Stein (discussed above) dismissed monopoly leveraging claims because the Ninth Circuit does not recognize monopoly leveraging as an independent theory of liability under Section 2.

requiring a showing of attempted monopolization. The monopoly leveraging claim also does not suffer from the same defect as the essential facilities and price squeeze claims which alleged exclusionary conduct based solely on BellSouth's duties under the 1996 Act. BellSouth's alleged monopoly power in the local telephone market could be used to leverage monopoly power in the DSL market even in the absence of the 1996 Act.[17] Further, Goldwasser did not involve a secondary market such as DSL services, and the court did not consider any allegation of monopoly leveraging. Although Covad's leveraging theory is no doubt based largely on BellSouth's failure to permit collocation to competitors, the allegation of leveraging also includes references to other anticompetitive conduct which would include misleading advertising and other activities not implicated by the 1996 Act. Accordingly, the motion to dismiss the monopoly leverage allegation is DENIED.

To summarize the court's ruling on the motion to dismiss claims under Section 2 of the Sherman Act, the motion to dismiss is GRANTED as follows: (1) Count 1 for essential facilities and is hereby DISMISSED without leave to amend, along with allegation categories one through five and seven and eight (Complaint ¶¶ 15,47-90 and 96); (2) allegations of a price squeeze in category six (*Id.* ¶¶ 91-95) and are hereby DISMISSED without leave to amend; (3) allegations of misappropriation of confidential customer information in category ten (*Id.* ¶¶ 99- 101) and are hereby DISMISSED

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[17] For example, assuming that the 1996 Act and the Interconnection Agreement did not exist and Covad was required to build its own independent network, a monopoly leveraging theory could work because BellSouth could use its monopoly power in the local telephone market (by possessing almost all local loops) to achieve monopoly power in the DSL market. Although the facts supporting Covad's leveraging claim may ultimately turn on questions of Covad's access to BellSouth's network, for the purposes of a Rule 12(b)(6) motion, the court finds that a monopoly leveraging theory is at least cognizable at this stage of the litigation.

without leave to amend. The motion is DENIED for: (1) Counts 2 and 3 of the complaint as they relate to allegations of predatory advertising in category nine (*Id.* ¶¶ 97-98); and (2) Count 2 of the complaint as it relates to allegations of monopoly leveraging in category eleven (*Id.* ¶ 45).

III. Claims under State Antitrust Law

BellSouth has also moved to dismiss all the state antitrust claims in the complaint under Rule 12(b)(6) for the same reasons stated in its motion to dismiss claims under the Sherman Act. Covad has brought antitrust claims for monopolization and attempted monopolization under the laws of six states: Ala. Code § 8-10-3; Fla. Stat. § 542.19; Ky. Rev. Stat. Ann. § 367.175; La. Rev. Stat. Ann. § 51.123; N.C. Gen. Stat. § 75-2.1; Tenn. Code Ann. § 47-25-101. Many of the antitrust laws of these states closely mirror federal law and/or expressly defer to federal case law interpreting antitrust law. *See, e.g.*, FLA. STAT. ANN. § 542.32 ("[D]ue consideration and great weight [is to] be given to the interpretations of the federal courts relating to comparable federal antitrust statutes."); N.C. GEN. STAT. § 75-2.1 (containing language identical to Section 2); *McCluney v. Zap Prof'l Photographv, Inc.*, 663 So. 2d 922, 926 (Ala. 1995) ('The federal law relating to monopolization governs Alabama antitrust actions."); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 478 So. 2d 1240 (La. Ct. App. 4 Cir. 1985) ("To establish a cause of action under [LA. REV. STAT. ANN. § 51.123], the pleadings must state facts sufficient to show that the Defendants possessed monopoly power in a clearly defined economic and geographic market and had the general purpose or intent to exercise or maintain that power.").

However, the laws of Kentucky and Tennessee expressly prohibit the application of their antitrust laws to utilities such as BellSouth. *See* KY. REV. STAT. ANN. § 367.176(1) ("No

provision of KRS 367.175 shall be construed to make illegal the activities of . . . any utility [such as BellSouth] as defined in KRS 278.010(3)."); *State ex rel. Thompson v. Nashville Rv. & Light Co.*, 151 Tenn. 77,268 S. W. 120,124 (1925) ("Telephone and telegraph companies . . . and all like concerns do not fall within the purview of the Anti-Trust Act, chapter 140, Acts of 1903 [now section47- 25-1011, relating to the production and distribution of articles made from domestic raw material.").

Because Kentucky and Tennessee prohibit the application of their antitrust laws to utilities such as BellSouth, these counts are hereby dismissed. The remaining state law antitrust counts will be dismissed concerning all the allegations that were dismissed under the Sherman Act, but the remaining state law claims can continue under theories of predatory advertising and monopoly leveraging. Accordingly, BellSouth's motion to dismiss Counts 13, 14, 22 and 23 is GRANTED and these counts are DISMISSED without leave to amend. The motion is DENIED for Counts 6, 7, 9, 10, 16, 17, 19, and 20 relating to allegations of misleading advertising.

IV. Claims under the 1996 Act and for Breach of Contract

BellSouth has also moved to dismiss Count 4: claims under 47 U.S.C. §§ 206, 207 and 222 of the 1996, and Count 5: breach of contract, pursuant to Rule 12(b)(l). BellSouth contends that these counts should be dismissed for lack of jurisdiction because the dispute has not been submitted to the respective state PSCs. Covad responds that the dispute alleged in the complaint goes far beyond disputes reviewed by state PSCs and that PSCs are not the proper forum in this case because they are unable to award damages for past conduct.

PSCs have the power to not only consent to Interconnection Agreements, but to later interpret and enforce

them as well. See Supra, No. 99-1706-CIV, p. 8; *see also Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475,479- 80 (5th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Comm. Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *BellSouth Telecomm., Inc. v. MCI Metro Access Transmission Sews., Inc.*, 97 F. Supp. 2d 1363,1366 (N.D. Ga. 2000). Federal courts only possess jurisdiction under 47 U.S.C. § 252(e) following a determination by a PSC. *See Supra*, No. 99-1706-CIV, p. 8; *Indiana Bell Tel. Co. v. McCarty*, 30 F. Supp. 2d 1100 (S.D. Ind. 1998). Courts have found that section 252(e) governs disputes arising from interconnection agreements. *See Southwestern Bell Tel. Co. v. McKee*, 1997 WL 450041 at *2 (D. Kan. July 15, 1997) (finding that Congress, through 252(e), expressed its intent that courts would "construe strictly the jurisdictional provision of the [1996 Act] and resolve any doubts against federal jurisdiction"); *see also Indiana Bell*, 30 F. Supp. 2d at 1104 (noting that allowing complainants to circumvent the jurisdictional scheme would "jeopardize the entire system of review established by the Act"). Courts have also found that sections 206 and 207 do not grant federal courts jurisdiction independent of section 252(e) when claims directly implicate the regulatory scheme of the 1996 Act. *See Intermedia*, No. 8:00-Civ-1410-T-24; Law Offices of *Curtis V. Trinko v. Bell Atlantic Corp.*, 123 F. Supp. 2d 738,743 (S.D.N.Y. 2000).

Covad alleges in Count 4 that BellSouth violated section 222 for misappropriating customer information, and alleges in Count 5 that it breached its interconnection agreement. Both of these counts relate directly to duties under the 1996 Act or the interconnection agreement, which are to be first reviewed and enforced by the respective PSCs. Because Covad's complaint does not indicate that it sought review of a determination by a PSC, this court does not have jurisdiction under section 252(e). Accordingly, the motion to dismiss Counts 4 and 5 of the complaint is GRANTED and these counts are DISMISSED without leave to amend.

V. State Law Claims for Interference with Business Relations and unfair Competition.

Finally, BellSouth moves to dismiss all of Covad's counts of interference with business relations under Rule 12(b)(3) and (6). BellSouth contends that these claims must fail because: (1) facts alleged to show interference are preempted by the 1996 Act; (2) interference claims from states other than Georgia are inapplicable because of a choice-of-law clause in the interconnection agreement; and (3) all the interference claims fail to state a claim because BellSouth is not a "stranger" to the relationship of Covad and its DSL customers.

Covad has brought counts for tortious interference with business relations under the laws of Alabama, Florida, Georgia, Kentucky, North Carolina, and Tennessee, and one count of unfair competition under Louisiana law.[18] For each count, Covad alleges that BellSouth unlawfully interfered with its contractual and business relations with its customers. The interference occurred when:

> . . . [BellSouth] attempted to and did exclude Covad from competing in [each state], in the process interfering

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[18] To prove tortious interference with business relations, the plaintiff must demonstrate (1) the existence of a contract or business relation; (2) the defendant's knowledge of the contract or business relation; (3) intentional interference by the defendant with the contract or business relation; (4) the absence of justification for the defendant's interference; and (5) damage to the plaintiff resulting from the interference. *See Soap Co. v. Ecolab, Inc.*, 646 So. 2d 1366, 1370-71 (Ala. 1994); *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812,814 (Fla. 1994) (same); *Choice Hotels Intl. v. Ocmulgee Fields, Inc.*, 222 Ga. App. 185, 188, 474 S.E.2d 56 (1996) (same); *Carmichael-Lvnch-Nolan Adver. Agency, Inc. v. Bennett & Assocs., Inc.*, 561 S.W.2d 99,102 (Ky. Ct. App. 1977) (same); *Market Am., Inc. v. Christman-Orth*, 135 N.C. App. 143,158,520 S.E.2d 570 (1999) (similar elements); *New Life Corp. of Am. v. Thomas Nelson, Inc.*, 932 S.W.2d 921, 927 (Tenn. Ct. App. 1996) (same).

> with Covad's ability to offer services to consumers in those markets, including causing the cancellation of contracts to purchase Covad service. BellSouth further improperly interfered with Covad's existing and prospective business relations with customers by, among other things, improperly soliciting customers not to enter into contracts with Covad or to breach existing contracts, disparaging Covad's products and services, and wrongfully delaying and refusing to supply services necessary for development and completion of Covad's business relations with its existing and prospective customers.

Complaint ¶¶ 139, 158,167,186,218 and 237.

Similar to Covad's allegations surrounding its antitrust claims and breach of contract claims, the court finds that allegations relating to BellSouth's duties under the 1996 Act fail to state a claim. These allegations would include all the allegations (noted above) for categories (1)-(8) and (10) (paragraphs 47-96 and 99-101 of the complaint) and which relate to the claims for business interference (noted in the above paragraph) in allegations such as "interfering with Covad's ability to offer services to consumers" and "wrongfully delaying and refusing to supply services necessary for development and completion of Covad's business relations." These allegations are merely a restated breach of contract claim which the court has already dismissed for the reasons noted above.

However, Covad's claims for interference with business relations could still survive under allegations of "improperly soliciting customers not to enter into contracts with Covad or to breach existing contracts, [and] disparaging Covad's products and services." These allegations, standing apart from the 1996 Act, could state a claim for interference with business relations. Although an improper solicitation" may include BellSouth's alleged misappropriation of confidential

customer information (which the court has dismissed), an improper solicitation and "disparagement" of Covad could constitute an interference with business relations without the alleged misappropriation.

The court rejects BellSouth's arguments that BellSouth is not a "stranger" to the relationship of Covad and its customers for a proper interference claim to be alleged. The remaining allegations of improper solicitation to not enter into contracts with Covad and disparagement of Covad's services does not involve any duty under the 1996 Act or the Interconnection Agreement. The cases cited by BellSouth are also distinguishable. *See, e.g., Atlanta Market Ctr. Mgmt. Co. v. Eauitable Real Estate Inv. Mgmt., Inc.*, 269 Ga. 604, 609, 503 S.E.2d 278 (1998) ("[I]n order for a defendant to be liable for tortious interference with contractual relations, the defendant must be a stranger to both the contract and the business relationship giving rise to and underpinning the contract."). Although BellSouth may have provided wholesale services to Covad and BellSouth owns many of the lines used by Covad customers, BellSouth, under the facts alleged, would be a stranger to the business relationship of Covad and its customers for DSL services.

The court also rejects BellSouth's argument that the Interconnection Agreement's choice-of-law clause bars claims for interference with business relations under state laws other than Georgia. The clause states that "[t]his Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Georgia, without regard to its conflict of laws principles." Agreement ¶ 17. However, the clause does not state that "any and all claims arising out of the relationship between the parties shall be governed by Georgia law." "Consequently, [the court] conclude[s] that the provision is not applicable in determining whether plaintiffs have set forth a valid tort claim." *Young v. W.S. Badcock Corp.*, 222 Ga. App. 218, 219, 474 S.E.2d 87

(1996); *see also Sunbelt Veterinary Supply, Inc. v. International Bus. Sys. U.S., Inc.*, 985 F. Supp. 1352,1356 (M.D. Ala. 1997) (interpreting similar clause). Accordingly, BellSouth's motion to dismiss Counts 8,11,15,18,21 and 24 under Rule'12(b)(3) is DENIED.

Finally, the court agrees with BellSouth that Covad's claim under Louisiana's unfair competition statute (LA. REV. STAT. ANN. § 51:1405) is not applicable to BellSouth. LA. REV. STAT. ANN. § 51:1406 provides an exemption for unfair trade practices of utilities regulated by the Louisiana PSC, including actions arising from advertising.[19] Thus, the motion to dismiss Count 18 is GRANTED and the count is DISMISSED.

Summary

The defendants' motion to file excess page limitations [Doc. No. 5-1] is hereby GRANTED. The defendants' motion to dismiss [Doc. No. 6-11 is GRANTED in part and DENIED in part. The motion is GRANTED for the following counts and allegations:

> (1) Count 1 for essential facilities, along with allegation categories one through five and seven and eight (Complaint ¶¶ 15, 47-90 and 96);

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[19] The opinion of the Louisiana Attorney General states in part:

> Since advertising by electric utilities is undeniably a matter both connected with and growing out of service rendered by such public utilities, and such advertising expends funds generated by consumer billings and adds to expenses taken into account in the rate determination process, advertising by electric utilities is an action or transaction subject to jurisdiction of the public service commission and is thus encompassed by exemption from consumer protection law under this section.

Op. Atty. Gen., No. 77-185, March 16, 1977.

(2) allegations of a price squeeze in category six (*Id.* ¶¶ 91-95);

(3) allegations of misappropriation of confidential customer information in category ten (*Id.* ¶¶ 99-101).

(4) Counts 4 and 5 for breach of contract and under the 1996 Act;

(5) Counts 13, 14, 22 and 23 under state antitrust law;

(6) Count 18 under Louisiana law.

The motion is DENIED for:

(1) Counts 2 and 3 of the complaint as they relate to allegations of predatory advertising in category nine (*Id.* ¶¶ 97-98); and

(2) Count 2 of the complaint as it relates to allegations of monopoly leveraging in category eleven (*Id.* ¶45).

(3) Counts 6, 7, 9, 10, 16, 17, 19, and 20 under state antitrust law;

(4) Counts 8, 11, 15, 18, 21 and 24 under state law for interference with business relations.

SO ORDERED, this 6th day of July, 2001.

/s/ Beverly B. Martin
BEVERLY B. MARTIN
UNITED STATES DISTRICT JUDGE

APPENDIX F

47 USCS § 206 (2004)

§ 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

APPENDIX G

47 USCS § 207 (2004)

§ 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

APPENDIX H

47 USCS § 222 (2004)

§ 222. Privacy of customer information

(a) In general. Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services pro vided by a telecommunications carrier.

(b) Confidentiality of carrier information. A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

(c) Confidentiality of customer proprietary network information.

(1) Privacy requirements for telecommunications carriers. Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

(2) Disclosure on request by customers. A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request

by the customer, to any person designated by the customer.

(3) Aggregate customer information. A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

(d) Exceptions. Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents—

(1) to initiate, render, bill, and collect for telecommunications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services;

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service; and

(4) to provide call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) [47 USCS § 332(d)])—

(A) to a public safety answering point, emergency medical service provider or emergency dispatch provider, public safety, fire service, or law enforcement official, or hospital emergency or trauma care facility, in order to respond to the user's call for emergency services;

(B) to inform the user's legal guardian or members of the user's immediate family of the user's location in an emergency situation that involves the risk of death or serious physical harm; or

(C) to providers of information or database management services solely for purposes of assisting in the delivery of emergency services in response to an emergency.

(e) Subscriber list information. Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

(f) Authority to use wireless location information. For purposes of subsection (c)(1), without the express prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure of or access to—

(1) call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) [47 USCS § 332(d)]), other than in accordance with subsection (d)(4); or

(2) automatic crash notification information to any person other than for use in the operation of an automatic crash notification system.

(g) Subscriber listed and unlisted information for emergency services. Notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service shall provide information described in subsection (i)(3)(A) [(h)(3)(A)] (including information pertaining to subscribers whose information is unlisted or unpublished) that is in its possession or control (including information pertaining to subscribers of other carriers) on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions to providers of emergency services, and providers of emergency support services, solely for purposes of delivering or assisting in the delivery of emergency services.

(h) Definitions. As used in this section:

(1) Customer proprietary network information. The term "customer proprietary network information" means—

(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.

(2) Aggregate information. The term "aggregate customer information" means collective data that relates to a group or category of services or customers, from which

individual customer identities and characteristics have been removed.

(3) Subscriber list information. The term "subscriber list information" means any information—

(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

(4) Public safety answering point. The term "public safety answering point" means a facility that has been designated to receive emergency calls and route them to emergency service personnel.

(5) Emergency services. The term "emergency services" means 9-1-1 emergency services and emergency notification services.

(6) Emergency notification services. The term "emergency notification services" means services that notify the public of an emergency.

(7) Emergency support services. The term "emergency support services" means information or data base management services used in support of emergency services.

APPENDIX I

47 USCS § 252 (2004)

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation.

(1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251 [47 USCS § 251], an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 [47 USCS § 251(b), (c)]. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any

other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the

unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 [47 USCS § 251], including the regulations prescribed by the Commission pursuant to section 251 [47 USCS § 251];

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 [47 USCS § 251(c)(2)], and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section [47 USCS § 251 (c)(3)]—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic.

(A) In general. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) [47 USCS § 251(b)(5)], a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction. This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services. For the purposes of section 251(c)(4) [47 USCS § 251(c)(4)], a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission.

(1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection. The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251 [47 USCS § 251], including the regulations prescribed by the Commission pursuant to section 251 [47 USCS § 251], or the standards set forth in subsection (d) of this section.

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253 [47 USCS § 253], nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision. If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have juris-

diction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions. In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [47 USCS § 251] and this section.

(f) Statements of generally available terms.

(1) In general. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 [47 USCS § 251] and the regulations thereunder and the standards applicable under this section.

(2) State commission review. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 [47 USCS § 251] and the regulations thereunder. Except as provided in section 253 [47 USCS § 253], nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected. The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 [47 USCS § 251].

(g) Consolidation of State proceedings. Where not inconsistent with the requirements of this Act [47 USCS §§ 151 *et seq.*], a State commission may, to the extent

practical, consolidate proceedings under sections 214(e), 251(f), 253 [47 USCS §§ 214(e), 251(f), 253], and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act [47 USCS §§ 151 *et seq.*].

(h) Filing required. A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier. For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) [47 USCS § 251(h)].